

1-1-1990

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## Recommended Citation

David P. Kallus, *Erisa: Do Health Care Providers Have Standing to Bring a Civil Enforcement Action Under Section 1132(a)?*, 30 SANTA CLARA L. REV. 173 (1990).

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# ERISA: DO HEALTH CARE PROVIDERS HAVE STANDING TO BRING A CIVIL ENFORCEMENT ACTION UNDER SECTION 1132(a)?

David P. Kallus\*

## I. INTRODUCTION

Congress enacted the Employee Retirement Income Security Act of 1974 (ERISA)<sup>1</sup> to protect the interests of employees and their beneficiaries in employee pension plans.<sup>2</sup> ERISA imposes minimum participation,<sup>3</sup> vesting<sup>4</sup> and funding<sup>5</sup> standards on such plans, and establishes rules concerning reporting,<sup>6</sup> disclosure<sup>7</sup> and fiduciary responsibility.<sup>8</sup> Further, to eliminate "the threat of conflicting and inconsistent State and local regulation"<sup>9</sup> of employee pension plans,

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\* 1990 by David P. Kallus.

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1. 29 U.S.C. §§ 1001-1461 (1982 & Supp. V 1987).

2. 29 U.S.C. § 1001(c) (1982) (ERISA's declared policy is "to protect . . . the interests of participants in private pension plans and their beneficiaries"); H.R. REP. NO. 533, 93rd Cong., 2d Sess. 1, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4639 ("The primary purpose of the bill is the protection of individual pension rights. . . ."); see *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984) ("Congress wanted to guarantee that 'if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it.'") (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980)); *Taggart Corp. v. Life and Health Benefits Admin., Inc.*, 617 F.2d 1208, 1211 (5th Cir. 1980) ("ERISA's legislative history demonstrates that its drafters were principally concerned with abuses occurring in respect of private pension assets."), *cert. denied sub nom. Taggart Corp. v. Efros*, 450 U.S. 1030 (1981).

The terms "employee pension benefit plan" and "pension plan" are defined at section 1002(2)(A) of ERISA. See 29 U.S.C. § 1002(2)(A) (1982); see also 29 C.F.R. § 2510.3-2 (1988) (Dept. of Labor regulations further defining what does and does not constitute an employee pension benefit plan for purposes of ERISA).

3. 29 U.S.C. § 1052 (1982 & Supp. V 1987).

4. *Id.* § 1053.

5. *Id.* §§ 1082-1085.

6. *Id.* §§ 1021-1031.

7. *Id.*

8. *Id.* §§ 1101-1114.

9. 120 CONG. REC. 29,197 (1974) (statement of Rep. Dent), quoted in *Shaw v. Delta*

ERISA preempts all state laws insofar as they "relate to" such plans,<sup>10</sup> thereby "establish[ing] pension plan regulation as exclu-

Airlines, Inc., 463 U.S. 85, 99 (1983).

10. ERISA's preemption provision provides:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter *shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.*

29 U.S.C. § 1144(a) (1982) (emphasis added).

The United States Supreme Court has repeatedly emphasized the breadth of ERISA's preemption provision. *See, e.g.,* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45-46 (1987) ("the express pre-emption provisions of ERISA are deliberately expansive"); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985) ("The pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."). *But cf.* Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 7-8 (1987) (ERISA preempts only state laws that relate to an "employee benefit plan" as opposed to state laws that relate merely to an "employee benefit"). Further, the Supreme Court has "broadly construed the words 'relate to' in order to give proper effect to the preemption language of ERISA." Cefalu v. B.F. Goodrich Co., 871 F.2d 1290, 1293 (5th Cir. 1989); *see* Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983) ("A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." (footnote omitted)).

Given "the breadth of the preemption clause[,] . . . state laws found to be beyond [its] . . . scope . . . are few." Jackson v. Martin Marietta Corp., 805 F.2d 1498, 1499 (11th Cir. 1986). Nevertheless, the Supreme Court has stated that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw*, 463 U.S. at 100 n.21 (citing American Tel. & Tel. Co. v. Merry, 592 F.2d 118, 121 (2d Cir. 1979) (holding that ERISA does not preempt a state court order to garnish ERISA pension benefits to satisfy court-ordered child support or alimony payments)). For cases holding that a particular state law affects employee benefit plans in too tenuous, remote and peripheral a manner to warrant a finding that the law "relates to" such plans, *see, e.g.,* Perry v. P\*I\*E Nationwide, Inc., 872 F.2d 157, 161-62 (6th Cir. 1989) (employees' state law claims against employer for fraud, misrepresentation and promissory estoppel based on allegation that employer fraudulently induced employees' participation in an employee benefit plan), *cert. denied*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 1166 (1990); Aetna Life Ins. Co. v. Borges, 869 F.2d 142, 147 (2d Cir. 1989) (Connecticut's escheat law), *cert. denied*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 57 (1989); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456, 1470 (5th Cir. 1986) (state common law of corporate fiduciary duty), *cert. denied*, 479 U.S. 1034 & 1089 (1987); Rebaldo v. Cuomo, 749 F.2d 133, 138 (2d Cir. 1984) (state statute establishing hospital rates chargeable to employee benefit plans), *cert. denied*, 472 U.S. 1008 (1985); Lane v. Goren, 743 F.2d 1337, 1340 (9th Cir. 1984) (state employment anti-discrimination law); Greenblatt v. Budd Co., 666 F. Supp. 735, 741-42 (E.D. Pa. 1987) (employee's state common law claim for misrepresentation against employer based upon "employer's promise to provide the plaintiff with certain benefits at some unknown time in the future," *id.* at 742); Morningstar v. Meijer, Inc., 662 F. Supp. 555, 556-57 (E.D. Mich. 1987) (employee's state law claim against employer for breach of employment contract and seeking damages including "the value of future fringe benefits she would have received had her employment continued," *id.* at 556).

An express exception to ERISA's preemption provision is found in the "saving clause" which excepts from preemption "any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A) (1982). The saving clause is, in turn, qualified by the

"deemer clause" which states:

Neither an employee benefit plan . . . nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

*Id.* § 1144(b)(2)(B).

In *Metropolitan Life*, 471 U.S. 724 (1985), the Supreme Court read the saving clause and the deemer clause together as subjecting *insured* employee benefit plans to indirect regulation by state laws that "regulate insurance." The Court held, however, that *uninsured* employee benefit plans (also referred to in the case law as "self-insured" or "self-funded" plans) are not subject to such regulation. The Court stated:

We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing we merely give life to a distinction created by Congress in the "deemer clause," a distinction Congress is aware of and one it has chosen not to alter.

*Id.* at 747 (footnote omitted); *see also* *Reilly v. Blue Cross and Blue Shield United*, 846 F.2d 416, 418, 425 (7th Cir.) ("[S]tate laws arguably 'regulating insurance' are preempted by ERISA as to self-insured plans." *Id.* at 418. However, "[i]f a plan purchases insurance, as opposed to being self-insured, it is 'directly affected by state laws that regulate the insurance industry.'" *Id.* at 425 (quoting *Metropolitan Life*, 471 U.S. at 732)), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 109 S. Ct. 145 (1988); *Moore v. Provident Life and Accident Ins. Co.*, 786 F.2d 922, 927 (9th Cir. 1986); *Children's Hosp. v. Whitcomb*, 778 F.2d 239, 242 (5th Cir. 1985); *Ellington v. Metropolitan Life Ins. Co.*, 696 F. Supp. 1237, 1243 (S.D. Ind. 1988). *But see* *Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 493-94 (9th Cir. 1988) (holding that even if the state statute in question is a law which "regulates insurance," it is not saved from preemption by ERISA as to an *insured* plan), *cert. denied*, \_\_\_\_ U.S. \_\_\_\_, 109 S. Ct. 3216 (1989); *Northern Group Servs., Inc. v. Auto Owners Ins. Co.*, 833 F.2d 85, 90-95 (6th Cir. 1987) (holding that a state law which "regulates insurance" is saved from preemption as to a *self-insured* (uninsured) plan when "there is no demonstrated interest in national uniformity and preemption of state law would substantially disrupt a state regulatory scheme generally applicable to both insured and self-insured ERISA plans, as well as to insurers generally," *id.* at 95), *cert. denied sub nom.* *Northern Group Servs., Inc. v. State Farm Mut. Auto. Ins. Co.*, 486 U.S. 1017 (1988); *Rasmussen v. Metropolitan Life Ins. Co.*, 675 F. Supp. 1497, 1503 (W.D. La. 1987) ("the necessity of the insured/uninsured distinction has been cast in serious doubt by the Supreme Court's recent decision in *Pilot Life*").

To determine whether a state law "regulates insurance" within the meaning of the saving clause the Supreme Court has instructed courts to take what guidance is available from "a 'common-sense view' of the language of the saving clause itself," *Pilot Life*, 481 U.S. at 48, and to make use of "the case law interpreting the phrase 'business of insurance' under the McCarran-Ferguson Act, 15 U.S.C. § 1101-*et seq.* . . ." *Id.* Further, courts are to consider the exclusivity of ERISA's civil enforcement provisions. *Id.* at 51-52.

Cases construing the saving clause and the deemer clause are collected and discussed at Annotation, *Construction and Application of Preemption Exemption, Under Employee Retirement Income Security Act (29 USCS §§ 1001 et seq.), for State Laws Regulating Insurance, Banking, or Securities (29 USCS § 1144(b)(2))*, 87 A.L.R. FED. 797 (1988).

For commentary on ERISA preemption, see Gregory, *The Scope of ERISA Pre-emption: A Study in Effective Federalism*, 48 U. PITT. L. REV. 427 (1987); Irish & Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REF. 109 (1985); Kilberg & Inman, *Preemption of State Laws Relating to Employee Benefit Plans: An Analysis of ERISA Section 514*, 62 TEX. L. REV. 1313 (1984).

sively a federal concern."<sup>11</sup>

Although designed primarily to regulate employee pension plans, ERISA also governs employee welfare benefit plans.<sup>12</sup> Such plans are defined in ERISA to include any employer-sponsored plan, fund, or program designed to provide employees and their beneficiaries with "medical, surgical, or hospital care or benefits . . . ."<sup>13</sup>

11. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981) (footnote omitted). "Representative Dent described the 'reservation to Federal authority the sole power to regulate the field of employee benefit plans' as ERISA's 'crowning achievement.'" *Pilot Life*, 481 U.S. at 46 (quoting 120 CONG. REC. 29197 (1974) (statement of Rep. Dent)).

12. *Oversight Hearing on Employee Welfare Benefit Plans: Hearing Before the Subcomm. on Labor-Management Relations of the Comm. on Education and Labor on H.R. 5475*, 98th Cong., 2d. Sess. 23 (1984) [hereinafter *Oversight Hearing*] (statement of Robert A.G. Monks, Administrator, Office of Pension and Welfare Benefit Plans, U.S. Dept. of Labor) ("Although ERISA is thought of as being preeminently involved with pensions . . . it is also significant in its impact on welfare plans"); see also *id.* at 8 (prepared statement of M. Diane Dwight, Esq., Provost, Doyle & McPherson, Port Arthur, Tex.) ("While the primary aim of [ERISA] as it was finally passed was protection of pension benefits, it is equally true that many sought security and safeguards for welfare benefits as well"). See generally Clark, *ERISA's Application to Fringe Benefits Other Than Pension Plans*, 12 EMPLOYEE REL. L.J. 330 (1986).

13. 29 U.S.C. § 1002(1) (1982).

The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

*Id.*; see also 29 C.F.R. § 2510.3-1 (1988) (Dept. of Labor regulations further defining what does and does not constitute an "employee welfare benefit plan" for purposes of ERISA).

It has generally been held that five elements comprise the definition of a welfare plan:

(1) a "plan, fund or program" (2) established or maintained (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services or severance benefits (5) to the participants or their beneficiaries.

*Kanne v. Connecticut Gen. Life Ins. Co.*, 867 F.2d 489, 492 (9th Cir. 1988) (quoting *Donovan v. Dillingham*, 688 F.2d 1367, 1371 (11th Cir. 1982) (en banc)), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 109 S. Ct. 3216 (1989).

For cases addressing the issue of what constitutes an "employee welfare benefit plan" for purposes of ERISA, see, e.g., *Massachusetts v. Morash*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 109 S. Ct. 1668, 1672 (1989) (an employer's policy of paying discharged employees for unused vacation time does not constitute an "employee welfare benefit plan"); *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 11-19 (1987) (to qualify as a plan there must exist an ongoing administrative program or scheme for processing claims, paying benefits and generally meeting the em-

Thus, employee health care plans—the focus of this article—are a type of employee welfare benefit plan governed by ERISA.

Unlike ERISA's heavy regulation of employee pension plans,<sup>14</sup> its regulation of employee welfare benefit plans is very limited.<sup>15</sup> "[T]he only statutory requirements imposed upon employee welfare benefit plans are the reporting and disclosure requirements of Part I and the fiduciary responsibility standards of Part IV."<sup>16</sup> ERISA's participation, vesting, and funding standards are inapplicable to employee welfare benefit plans.<sup>17</sup> Ironically, despite ERISA's limited

employer's obligations); *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277, 280 (11th Cir. 1987) ("We conclude that the insurance policies in this case constitute a 'plan' as defined by ERISA, although we note with concern that this portends a dramatic increase in the federal court system's case load." (footnotes omitted)); *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 738-41 (7th Cir. 1986), *cert. denied*, 482 U.S. 915 (1987); *Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Bd. of Pub. Instruction*, 804 F.2d 1059, 1061-65 (8th Cir. 1986); *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140, 1144-46 (4th Cir. 1985), *summarily aff'd sub nom. Brooks v. Burlington Indus., Inc.*, 477 U.S. 901 (1986); *Matthew 25 Ministries, Inc. v. Corcoran*, 771 F.2d 21, 22-23 (2d Cir. 1985); *California Hosp. Ass'n v. Henning*, 770 F.2d 856, 858-62 (9th Cir. 1985), *amended*, 783 F.2d 946 (9th Cir.), *cert. denied*, 477 U.S. 904 (1986); *Gilbert v. Burlington Indus., Inc.* 765 F.2d 320, 324-26 (2d Cir. 1985), *summarily aff'd*, 477 U.S. 901 (1986); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502-04 (9th Cir. 1985); *Taggart Corp. v. Life and Health Benefits Admin., Inc.*, 617 F.2d 1208, 1210-12 (5th Cir. 1980), *cert. denied sub nom. Taggart v. Efros*, 450 U.S. 1030 (1981); *Wayne Chemical, Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 698-700 (7th Cir. 1977); *Davis v. Time Ins. Co.*, 698 F. Supp. 1317, 1318-21 (S.D. Miss. 1988); *Ellington v. Metropolitan Life Ins. Co.*, 696 F. Supp. 1237, 1239-40 (S.D. Ind. 1988); *Dodd v. John Hancock Mut. Life Ins. Co.*, 688 F. Supp. 564, 566-68 (E.D. Cal. 1988); *Wickman v. Northwestern Nat'l Life Ins. Co.*, 9 EBC 1482, 1484-89 (D. Mass. 1987); *National Metalcrafters v. McNeil*, 602 F. Supp. 232, 235-37 (N.D. Ill. 1985), *rev'd on other grounds*, 784 F.2d 817 (7th Cir. 1986); *Insurance & Prepaid Benefits Trusts v. Marshall*, 90 F.R.D. 703, 704-07 (C.D. Cal. 1981); *Bell v. Employee Sec. Benefit Ass'n*, 437 F. Supp. 382, 388-96 (D. Kan. 1977); *Hamberlin v. VIP Ins. Trust*, 434 F. Supp. 1196, 1197-1200 (D. Ariz. 1977); *Golden Bear Family Restaurants, Inc. v. Murray*, 144 Ill. App. 3d 616, 621-25, 494 N.E.2d 581, 584-87 (1986).

The practitioner should be aware that ERISA's "Coverage" provision expressly excludes certain types of employee benefit plans from ERISA's coverage. See 29 U.S.C. § 1003(b) (1982). The "Coverage" provision also sets out certain criteria that must be met before an employee benefit plan will fall within ERISA's coverage. See *id.* § 1003(a).

14. See *supra* notes 3-8 and accompanying text.

15. See generally *Oversight Hearing*, *supra* note 12, at 19 (prepared statement of Robert A.G. Monks, Administrator, Office of Pension and Welfare Benefit Plans, U.S. Dept. of Labor) (describing the lack of standards established by Congress for welfare plans as compared to pension plans, and the "primarily archival" role of the Dept. of Labor with regard to welfare plans).

16. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 679 F.2d 1307, 1311 (9th Cir. 1982) (Tang, J., dissenting), *vacated on jurisdictional grounds*, 463 U.S. 1 (1983).

17. *Hansen v. White Motor Corp. (In re White Farm Equip. Co.)*, 788 F.2d 1186, 1191 (6th Cir. 1986) ("There is an express statutory exclusion of welfare plans from the stringent minimum vesting, participation, and funding standards imposed on pension plans . . ."); *Oversight Hearing*, *supra* note 12, at 19 (prepared statement of Robert A.G. Monks, Administrator, Office of Pension and Welfare Benefit Plans, U.S. Dept. of Labor) ("[T]he

regulation of employee welfare benefit plans, Congress chose—as it did with respect to the more heavily-regulated employee pension plans<sup>18</sup>—to preempt all state laws insofar as they “relate to” such plans,<sup>19</sup> thereby making employee welfare benefit plan regulation an exclusively federal concern. “Thus, ERISA, without providing any guidance, governs all forms of health and medical benefits provided by employers and, at the same time, eliminates all state laws that affect employee health benefits.”<sup>20</sup>

Because ERISA preempts all state laws insofar as they “relate to” ERISA-governed employee health care plans, a plaintiff seeking to assert a cause of action against such a plan<sup>21</sup> must generally look to ERISA’s civil enforcement provisions<sup>22</sup> rather than to state law.<sup>23</sup>

Congress did not extend the minimum participation, vesting and funding standards established for pensions to private employer welfare benefit plans.”); Perkins, *ERISA Preemption Affecting Indigent Health Care Coverage*, 20 CLEARINGHOUSE REV. 1506, 1507 (Apr. 1987) (“Employee welfare benefit plans . . . are covered only by reporting, disclosure and fiduciary standards. Funding, termination and participation standards are not included. And the administrative agency primarily in charge, the Department of Labor, has not actively moved to regulate ERISA health plans.”).

18. See *supra* notes 9-11 and accompanying text.

19. ERISA’s preemption provision provides for the preemption of “all State laws insofar as they . . . relate to any *employee benefit plan* described in section 1003(a) of this title and not exempt under section 1003(b) of this title.” 29 U.S.C. § 1144(a) (1982) (emphasis added). The term “employee benefit plan” is defined in ERISA to include both pension and welfare plans. See *id.* § 1002(3). Thus, ERISA’s preemption provision applies to welfare plans. For a thorough discussion of ERISA’s preemption provision, see *supra* note 10.

20. Dudovitz, *Health Insurance and ERISA: An Update*, 20 CLEARINGHOUSE REV. 1415, 1415 (Mar. 1987).

21. Section 1132(d)(1) of ERISA provides in part that “[a]n employee benefit plan may sue or be sued under this subchapter as an entity.” 29 U.S.C. § 1132(d)(1) (1982).

22. See *infra* notes 26-32 and accompanying text for a discussion of ERISA’s civil enforcement provisions.

23. See, e.g., *Keel v. Group Hospitalization Medical Servs., Inc.*, 695 F. Supp. 223, 227 (E.D. Va. 1988) (since plaintiffs’ state law claims are preempted by ERISA, “[t]he only remedy available to the plaintiffs must . . . derive from those provided in ERISA” (footnote omitted)).

In *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), the Supreme Court adopted the Solicitor General’s view that

Congress clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) [29 U.S.C. § 1132(a)] be the *exclusive* vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits, and that *varying state causes of action for claims within the scope of § 502(a) [29 U.S.C. § 1132(a)] would pose an obstacle to the purposes and objectives of Congress.*

*Id.* at 52 (emphasis added); see also *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 62-63 (1987) (“[A] suit by a beneficiary to recover benefits from a covered plan . . . falls directly under § 502(a)(1)(B) [29 U.S.C. § 1132(a)(1)(B)] of ERISA, which provides an *exclusive* federal cause of action for resolution of such disputes” (emphasis added)). But see H.R. REP. No. 801, 100th Cong., 2d Sess. pt. 2, at 63 (1988) (the Committee on Education and Labor

If ERISA's civil enforcement provisions do not provide the plaintiff with a cause of action, the plaintiff is left unprotected under both state and federal law, and is effectively denied all access to the courts to redress its grievance against the plan. This situation has raised concerns on the part of health care providers that render services to individuals covered by ERISA-governed employee health care plans. Unless ERISA's civil enforcement provisions provide health care providers with a cause of action against such plans they will be unprotected under both state<sup>24</sup> and federal law and will be forced "to

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disagrees with the Supreme Court's conclusion in *Pilot Life* "that ERISA's civil enforcement provisions under section 502 were intended to be the exclusive remedies afforded to plan participants and beneficiaries" and "believes that the legislative history of ERISA and subsequent expansions of ERISA support the view that Congress intended for the courts to develop a Federal common law with respect to employee benefit plans, including the development of appropriate remedies, even if they are not specifically enumerated in section 502 of ERISA").

The Supreme Court in *Pilot Life* went on to hold that the plaintiff-employee's state common law claims for tortious breach of contract (referred to in the plaintiff's brief to the Supreme Court and in the Supreme Court's opinion as the Mississippi common law of bad faith), breach of fiduciary duty, and fraud in the inducement, *Pilot Life*, 481 U.S. at 43, each based on an alleged improper processing of a claim for benefits, were preempted by ERISA. *Id.* at 57. For commentary on the *Pilot Life* decision, see, e.g., Chittenden, *ERISA Preemption: The Demise of Bad Faith Actions In Group Insurance Cases*, 12 S. ILL. U.L.J. 517 (1988); Note, *Blind Faith Conquers Bad Faith: Only Congress Can Save Us After Pilot Life Insurance Co. v. Dedeaux*, 21 LOY. L.A.L. REV. 1343 (1988).

In *Metropolitan Life*, 481 U.S. 58 (1987), the Supreme Court expanded on its decision in *Pilot Life*, holding that state common law claims asserting improper processing of a claim for benefits "are not only pre-empted by ERISA, but also displaced by ERISA's civil enforcement provision, § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to the extent that complaints filed in state courts purporting to plead such state common law causes of action are removable to federal court under 28 U.S.C. § 1441(b)." *Id.* at 60 (footnote omitted). The Court concluded: "Accordingly, this suit, though it purports to raise only state law claims, is necessarily federal in character by virtue of the clearly manifested intent of Congress. It, therefore, 'arise[s] under the . . . laws . . . of the United States,' 28 U.S.C. § 1331, and is removable to federal court by the defendants, 28 U.S.C. § 1441(b)." *Id.* at 67.

Thus, *Metropolitan Life* extends the "Avco exception" to the well-pleaded complaint rule to situations where a plaintiff files a complaint in state court asserting only state law claims that are preempted by section 1144(a) of ERISA and that fall within the scope of section 1132(a)(1)(B) of ERISA. In such a case, the state law claims are displaced by section 1132(a)(1)(B) and "recharacterized" as claims arising under that section, thereby making the action removable to federal court despite the fact that the complaint on its face makes reference only to state law. *Id.* at 63-67; see also *Allstate Ins. Co. v. The 65 Sec. Plan*, 879 F.2d 90, 93 (3d Cir. 1989) (discussing the two circumstances that must be present for *Avco* or the "complete preemption" doctrine to apply); *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157, 1161-63 (5th Cir. 1989) (discussing the *Avco* exception to the well-pleaded complaint rule), *cert. denied sub nom. American Home Ins. Group v. Aaron*, \_\_\_\_ U.S. \_\_\_\_, 110 S. Ct. 1121 (1990). See generally Comment, *The Evolving Concept of Preemption Removal: An Expansion of Federal Jurisdiction*, 20 ST. MARY'S L.J. 189 (1988).

24. The preemption principles enunciated in *Pilot Life*, 481 U.S. 41 (1987), have been held to apply where the plaintiff asserting the state law claims is a health care provider. See *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1290 (5th Cir. 1988)



evaluate the solvency of patients before commencing medical treat-

(hospital's state common law claims for breach of fiduciary duty, negligence, equitable estoppel, breach of contract and fraud preempted); *Stormont-Vail Regional Medical Center v. Kansas Bldg. Trades Open-End Health Care and Welfare Fund Uninsured Benefit Plan*, No. 88-4146 (D. Kan. Jan. 8, 1990) (WESTLAW, ALLFEDS Database, 1990 WL 11377) (provider's state law claims for breach of contract, unjust enrichment, estoppel and waiver preempted); *Albert Einstein Medical Center v. National Benefit Fund for Hosp. and Health Care Employees*, No. 89-5931 (E.D. Pa. Dec. 20, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 156374) ("the provisions of ERISA preempt plaintiffs' third party beneficiary claims against the Fund"); *Health Scan, Ltd. v. Travelers Ins. Co.*, 725 F. Supp. 268, 270 (E.D. Pa. 1989) (provider's promissory estoppel claim preempted); *Farber v. Billiot*, No. 89-3634 (E.D. La. Sept. 28, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 113560) (provider's claims under Louisiana's claims processing statute preempted); *Multicare Health Care Servs., Inc. v. General Am. Life Ins. Co.*, 720 F. Supp. 581, 582 (N.D. Tex. 1989) (provider's claim under Texas Insurance Code provision regulating unfair and deceptive insurance practices preempted); *Taylor v. Blue Cross/Blue Shield*, 684 F. Supp. 1352, 1356-60 (E.D. La. 1988) (provider's cause of action under Louisiana's claims processing statute preempted); *D'Onofrio v. Travelers Ins. Co.*, 662 F. Supp. 872, 874 (E.D. Ark. 1987) (provider's state common law breach of contract claim for failure to pay benefits preempted); *H.C.A. Health Servs., Inc. v. Blue Cross Ins. Co.*, No. 87-2348 (E.D. La. Sept. 11, 1987) (WESTLAW, ALLFEDS Database, 1987 WL 17323) (provider's cause of action under Louisiana's claims processing statute preempted); *Providence Hosp. v. National Labor Union Health & Welfare Fund*, 162 Mich. App. 191, 195-200, 412 N.W.2d 690, 692-94 (1987) (provider's state common law contract claim for failure to pay benefits preempted); *see also* *Misic v. Building Serv. Employees Health and Welfare Trust*, 789 F.2d 1374, 1379 (9th Cir.) (provider's state law tort claims and statutory claim for unfair business practices in violation of section 790.03 of the California Insurance Code preempted); *DePaul Hosp. v. Mutual Life Ins. Co.*, 487 So. 2d 143, 146 (La. Ct. App.) (provider's State law claim for negligent disclosure preempted), *writ denied*, 492 So. 2d 1218 (La. 1986). *See generally* *Kennedy v. Deere & Co.*, 118 Ill. 2d 69, 75, 514 N.E.2d 171, 174 (1987) ("[S]ection 514(a) [29 U.S.C. § 1144(a)] of ERISA . . . would prohibit an assignee [health care provider] from acting under State law to establish a legal claim to benefits under a plan"), *aff'g* 142 Ill. App. 3d 781, 492 N.E.2d 199 (1986), *cert. denied*, 484 U.S. 1064 (1988). *But see* *Albert Einstein Medical Center v. National Benefit Fund for Hosp. and Health Care Employees*, No. 89-5931 (E.D. Pa. Dec. 20, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 156374) (provider's state law claims for breach of contract, unjust enrichment, quantum meruit and promissory estoppel not preempted "to the extent that plaintiffs are claiming an independent right to payment, apart from the terms of the plan"); *Albert Einstein Medical Center v. Action Mfg. Co.*, 697 F. Supp. 883, 884 (E.D. Pa. 1988) (provider's state law estoppel claim not preempted); *HCA Health Servs., Inc. v. Catrambone*, 682 F. Supp. 381, 383 (N.D. Ill. 1988) (provider's state law estoppel claim not preempted), *memorandum and order denying reconsideration*, No. 87 C 947 (N.D. Ill. Apr. 5, 1988) (WESTLAW, ALLFEDS Database, 1988 WL 33841).

The removal principles enunciated in *Metropolitan Life*, 481 U.S. 58 (1987), have also been held to apply where the plaintiff is a health care provider. *See, e.g.,* *Farber v. Billiot*, No. 89-3634 (E.D. La. Sept. 28, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 113560); *Taylor v. Blue Cross/Blue Shield of New York*, 684 F. Supp. 1352, 1359 (E.D. La. 1988); *D'Onofrio v. Travelers Ins. Co.*, 662 F. Supp. 872, 873-74 (E.D. Ark. 1987). In *D'Onofrio* the court stated:

The plaintiff here, an assignee of the beneficiary of an ERISA regulated plan, has sued on a common law breach of contract theory for alleged failure of the Travelers to pay sums due under the plan. Necessarily this claim is within the scope of ERISA's civil enforcement scheme, specifically 29 U.S.C. § 1132(a)(1)(B), and therefore is a suit arising under the laws of the United States. *Met-*

ment"<sup>25</sup> and, ultimately, to refuse treatment to those individuals incapable of paying for services through sources other than the employee health care plan.

ERISA's civil enforcement provisions are found in section 1132(a) of ERISA.<sup>26</sup> Section 1132(a) "identifies six types of civil actions that may be brought"<sup>27</sup> under ERISA and "specifies which persons—participants, beneficiaries, fiduciaries, or the Secretary of Labor—may bring"<sup>28</sup> each type of action.<sup>29</sup> One of the six types of

*Metropolitan Life Insurance Co. v. Taylor*, \_\_\_\_ U.S. at \_\_\_\_, 107 S.Ct. at 1544.

As such, this case is properly removable to federal court. *Id.*

*Id.* at 874.

The *D'Onofrio* decision is questionable in light of the Supreme Court's opinion in *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983). In that case the Supreme Court held, in effect, that a suit for relief under section 1132(a) of ERISA by a plaintiff who lacks standing to sue under that section does not "arise under" that section. *Id.* at 27 ("ERISA carefully enumerates the parties entitled to seek relief under § 502 [29 U.S.C. § 1132]; it does not provide anyone other than participants, beneficiaries, or fiduciaries with an express cause of action for a declaratory judgment on the issue in this case. *A suit for similar relief by some other party does not 'arise under' that provision.*" (emphasis added) (footnote omitted)). Thus, before a court can find that a plaintiff's state law claims are removable under *Metropolitan Life* the court must first find that the plaintiff has standing to sue under section 1132(a) of ERISA. *See, e.g., Allstate Ins. Co. v. The 65 Sec. Plan*, 879 F.2d 90, 94 (3d Cir. 1989) (state law claim of insurance company that lacked standing to sue under section 1132(a) was improperly removed to federal court); *Solomon v. Geraci*, No. 89-8607 (E.D. Pa. Dec. 19, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 156372) (state law claims of health care provider who lacked standing to sue under section 1132(a) of ERISA were improperly removed to federal court); *see also Albert Einstein Medical Center v. Action Mfg. Co.*, 697 F. Supp. 883, 885 n.3 (E.D. Pa. 1988) (dicta) ("Congress and the Supreme Court view the civil enforcement provisions as permitting removal only in suits that could be brought pursuant to those provisions, which restrict private actions to plan beneficiaries, fiduciaries, or participants. . . . Hence, plaintiff's suit, which could not have been brought under ERISA's civil enforcement provisions, is not of the type on which Congress seems to have intended to confer the 'extraordinary preemptive power' of removal"). The *D'Onofrio* court did not consider whether the plaintiff-health care provider had standing to sue under section 1132(a) before concluding that his state law claims were removable to federal court. Therefore, removal under *Metropolitan Life* may or may not have been proper in *D'Onofrio*.

25. *Misic v. Building Serv. Employees Health and Welfare Trust*, 789 F.2d 1374, 1377 (9th Cir. 1986).

26. 29 U.S.C. § 1132(a) (1982). *See infra* note 29 for the text of section 1132(a).

27. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 139-40 (1985).

28. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 25 (1983).

29. Section 1132(a) provides:

(a) A civil action may be brought-

(1) by a participant or beneficiary-

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or prac-

civil actions identified in section 1132(a) is an action to recover benefits due under an ERISA-governed employee benefit plan. This action is specifically identified in section 1132(a)(1)(B)<sup>30</sup> and, according to that section, may be asserted by a "participant"<sup>31</sup> or "beneficiary."<sup>32</sup>

This article addresses the issue of whether a health care provider that has rendered services to a participant or beneficiary in an ERISA-governed employee health care plan has standing<sup>33</sup> to assert the cause of action provided for in section 1132(a)(1)(B) of ERISA, either as a person expressly empowered by that section to sue,<sup>34</sup> or derivatively by virtue of an assignment of benefits.<sup>35</sup> This article also addresses the issue of whether health care providers have standing to sue under ERISA under the theory that the list of persons expressly empowered by section 1132(a) of ERISA to sue is not exclusive,<sup>36</sup>

tice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

29 U.S.C. § 1132(a) (1982).

30. *Id.* § 1132(a)(1)(B). See *supra* note 29 for the text of section 1132(a)(1)(B).

31. The term "participant" is defined at section 1002(7) of ERISA. See 29 U.S.C. § 1002(7) (1982). See *infra* text accompanying note 42 for the text of section 1002(7).

32. The term "beneficiary" is defined at section 1002(8) of ERISA. See 29 U.S.C. § 1002(8) (1982). See *infra* text accompanying note 43 for the text of section 1002(8).

33. The term "standing" as used in this article refers to statutory standing. Statutory standing refers to whether or not the statute itself precludes the plaintiff's suit. Note, *ERISA: To Sue or Not To Sue—A Question of Statutory Standing*, 19 U. MICH. J.L. REF. 239, 246 (1985) [hereinafter Note, *ERISA: To Sue or Not To Sue*]. Statutory standing should be distinguished from constitutional and prudential standing considerations. For a discussion of the three types of standing, see *id.* at 243-46.

34. Specifically, the article addresses the issue of whether a health care provider can qualify as a beneficiary as defined in section 1002(8) of ERISA. See *infra* notes 41-94 and accompanying text (Section II.A. *Persons Expressly Empowered by Section 1132(a) of ERISA to Sue*). If so, the health care provider would be expressly empowered to sue under section 1132(a)(1)(B).

35. Where a health care provider is assigned the benefits due a participant or beneficiary in an ERISA-governed employee health care plan in exchange for services rendered, the issue arises as to whether the health care provider, as the assignee of a person expressly empowered by section 1132(a)(1)(B) to sue, has standing, derivatively, to assert the claims of the assignor in whose shoes it stands. See *infra* notes 95-177 and accompanying text (Section II.B. *Derivative Standing by Virtue of an Assignment of Benefits*).

36. See *infra* notes 178-98 and accompanying text (Section II.C. *Standing to Sue Under*

and the issue of whether benefits due a judgment-debtor under an ERISA-governed employee welfare benefit plan are subject to garnishment by the judgment-creditor.<sup>37</sup>

## II. STANDING TO SUE UNDER ERISA

Standing to sue under ERISA has been found where: (1) the plaintiff is a person expressly empowered by section 1132(a) of ERISA to sue;<sup>38</sup> (2) the plaintiff is the assignee of a person expressly empowered by section 1132(a) of ERISA to sue, in which event the plaintiff-assignee "stands in the shoes" of the assignor for purposes of standing;<sup>39</sup> or (3) the court finds that the list of persons expressly

*the Theory That the List of Persons Expressly Empowered by Section 1132(a) of ERISA to Sue is Not Exclusive).*

37. See *infra* notes 199-228 and accompanying text (Section III. GARNISHMENT OF EMPLOYEE WELFARE BENEFITS).

38. See, e.g., *Salomon v. Transamerica Occidental Life Ins. Co.*, 801 F.2d 659, 660 (4th Cir. 1986) (fiance of deceased employee had standing to sue under ERISA because she fell "within the definition of beneficiary given in [29 U.S.C.] § 1002(8)" and was therefore "entitled to bring an ERISA claim under [29 U.S.C.] § 1132(a)(1)"); *Framingham Union Hosp., Inc. v. Travelers Ins. Co.*, 721 F. Supp. 1478, 1486 (D. Mass. 1989) ("[T]he Hospital is a fiduciary within the meaning of 29 U.S.C. § 1002(21)(A), and is therefore authorized to sue under ERISA."); cf. *Sladek v. Bell Sys. Management Pension Plan*, 880 F.2d 972, 979 (7th Cir. 1989) ("[T]he appellant has standing as a *potential* beneficiary within the meaning of 29 U.S.C. § 1002(8)" (emphasis added)).

39. See, e.g., *Michael Reese Hosp. and Medical Center v. Solo Cup Employee Health Benefit Plan*, 899 F.2d 639 (7th Cir. 1990) (implicitly holding that hospital, as assignee of participant or beneficiary, has standing to sue under ERISA); *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1289-90 (5th Cir. 1988) (health care provider, as assignee of beneficiary, has derivative standing to sue plan under ERISA if assignment is valid); *Mutual Life Ins. Co. v. Yampol*, 840 F.2d 421, 423, 427 (7th Cir. 1988) (assignee of fiduciary has standing to sue under ERISA); *Misic v. Building Serv. Employees Health and Welfare Trust*, 789 F.2d 1374, 1378-79 (9th Cir. 1986) (health care provider, as assignee of beneficiary, has derivative standing to sue plan under ERISA); *Stormont-Vail Regional Medical Center v. Kansas Bldg. Trades Open-End Health & Welfare Fund Uninsured Benefit Plan*, No. 88-4146 (D. Kan. Jan. 8, 1990) (WESTLAW, ALLFEDS Database, 1990 WL 11377) ("Stormont-Vail Regional Medical Center, as assignee of Dale Bieker, has standing to assert the claims of its assignor"); *H.C.A. Health Servs. v. American Thrift & Fin.*, No. 89-2912 (E.D. La. Dec. 28, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 159333) ("DePaul is an assignee of a participant or beneficiary under the plan and as such may bring suit under 29 U.S.C. § 1132(a)"); *Foster F. McGaw Hosp. of Loyola Univ. of Chicago v. Building Material Chauffeurs, Teamsters & Helpers Welfare Fund of Chicago*, Local 786, No. 89 C 0044 (N.D. Ill. Nov. 27, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 152616) ("As assignees, plaintiffs have standing to contest the trustees' decision to deny benefits."); *Farber v. Billiot*, No. 89-3634 (E.D. La. Sept. 28, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 113560) ("if Dr. Farber is a valid assignee of health benefits, he has standing under ERISA"); *St. Mary Medical Center v. Cristiano*, 724 F. Supp. 732, 740 (C.D. Cal. 1989) (provider, as assignee of benefits, has standing to sue under ERISA); *Multicare Health Care Servs., Inc. v. General Am. Life Ins. Co.*, 720 F. Supp. 581, 582 (N.D. Tex. 1989) ("ERISA's civil enforcement provisions extend to assignees of benefits like Multicare.");

empowered by section 1132(a) of ERISA to sue is not exclusive and that the plaintiff has standing to sue under ERISA despite the fact that the plaintiff is neither a person expressly empowered by section 1132(a) of ERISA to sue, nor the assignee of a person expressly empowered by section 1132(a) of ERISA to sue.<sup>40</sup>

#### A. *Persons Expressly Empowered by Section 1132(a) of ERISA to Sue*

As previously noted, section 1132(a)(1)(B) of ERISA expressly empowers participants and beneficiaries in an ERISA-governed employee benefit plan to sue the plan to recover benefits due under the plan.<sup>41</sup> ERISA defines the term "participant" to mean:

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Wisconsin Dep't of Health and Social Servs. v. Upholsterers Int'l Union Health and Welfare Fund, 686 F. Supp. 708, 713-14 (W.D. Wis. 1988) (state agency, as assignee of individuals covered by ERISA health plan, has standing to sue under ERISA); H.C.A. Health Servs., Inc. v. Blue Cross Ins. Co., No. 87-2348 (E.D. La. Sept. 11, 1987) (WESTLAW, ALLFEDS Database, 1987 WL 17323) (health care provider, as assignee of participant, has standing to sue plan under ERISA); Kennedy v. Deere & Co., 142 Ill. App. 3d 781, 785-87, 492 N.E.2d 199, 202-03 (1986) (health care provider, as assignee of participant or beneficiary, has derivative standing to sue plan under ERISA), *aff'd*, 118 Ill. 2d 69, 514 N.E.2d 171 (1987), *cert. denied*, 484 U.S. 1064 (1988); *see also* Northeast Dep't ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d 147, 167 (3d Cir. 1985) (Fullam, J., concurring) ("Where the entitlements of an identifiable beneficiary are at issue, the federal courts are open to litigation under 28 [sic] U.S.C. § 1132(a)(1)(B), I suggest, regardless of whether the action is maintained in the name of the beneficiary, or in the name of a personal representative, assignee or subrogee"). *But see id.* at 154 n.6 (majority opinion) (questioning Judge Fullam's conclusion "that there is jurisdiction in this case under 28 [sic] U.S.C. § 1132(a)(1)(B) because the ILGWU fund is the 'assignee or subrogee' of Mrs. Fazio" and expressing "serious doubts whether she could assign along with her substantive rights her right to sue in federal court"); Health Scan, Ltd. v. Travelers Ins. Co., 725 F. Supp. 268, 269 (E.D. Pa. 1989) ("standing under ERISA does not extend to assignees of plan benefits" (citing *Northeast Dep't ILGWU*)); Nationwide Mut. Ins. Co. v. Teamsters Health & Welfare Fund, 695 F. Supp. 181, 184 (E.D. Pa. 1988) ("Section 1132(a)(1)(B) does not extend to assignees of ERISA benefits" (citing *Northeast Dep't ILGWU*)).

In *Albert Einstein Medical Center v. National Benefit Fund for Hosp. and Health Care Employees*, No. 89-5931 (E.D. Pa. Dec. 20, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 156374) the court, relying on the above line of cases, found that a health care provider had standing to sue under ERISA under a "third-party beneficiary" theory based on a provision in the plan which provided: "The Fund will pay the hospital directly for all services covered by the plan."

40. *See, e.g.*, *Fentron Indus., Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1305 (9th Cir. 1982) (employer has standing to sue under ERISA despite fact that employers are not included in the list of persons expressly empowered by section 1132(a) of ERISA to sue because, for among other reasons, "[t]here is nothing in the legislative history to suggest either that the list of parties empowered to sue under this section is exclusive or that Congress intentionally omitted employers").

41. 29 U.S.C. § 1132(a)(1)(B) (1982). *See supra* note 29 for the text of section 1132(a)(1)(B).

[A]ny employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.<sup>42</sup>

The term "beneficiary" means "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."<sup>43</sup> Absent unusual circumstances, a health care provider will not qualify as a participant under ERISA.<sup>44</sup> Thus, the issue becomes whether, and under what circumstances, a health care provider can qualify as a beneficiary under ERISA. This issue has been addressed by two courts. The first court to address the issue was the United States District Court for the Western District of Pennsylvania in *Cameron Manor, Inc. v. United Mine Workers of America*.<sup>45</sup>

1. *Cameron Manor, Inc. v. United Mine Workers of America*

In *Cameron* a nursing care facility sued an ERISA-governed employee health care plan to recover benefits due under the plan for services rendered to plan participants. The nursing care facility "contend[ed] that it [had been] tacitly designated a beneficiary by the employee-patients by their selection of the facility for treatment."<sup>46</sup> The court rejected this contention, and concluded that as a matter of law a health care provider can never qualify as a beneficiary under ERISA. The court stated:

"Beneficiary" in the context of the various provisions of ERISA carries the connotation of a person, other than the employee-participant, who is covered by the plan's provisions—e.g., a spouse or dependent. Furthermore, the act of "designation" would appear to be such formal election as that

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42. 29 U.S.C. § 1002(7) (1982).

43. *Id.* § 1002(8).

44. See *Albert Einstein Medical Center v. National Benefit Fund for Hosp. and Health Care Employees*, No. 89-5931 (E.D. Pa. Dec. 20, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 156374) ("It is clear that the hospitals in the present case do not qualify as 'participants' under the ERISA statutory definition"); *Pritt v. Blue Cross and Blue Shield, Inc.*, 699 F. Supp. 81, 84 (S.D. W. Va. 1988) ("Neither party seriously contends that the Plaintiff [health care provider] is a 'participant' within the meaning of the statute"); *Cameron Manor, Inc. v. United Mine Workers of Am.*, 575 F. Supp. 1243, 1245 (W.D. Pa. 1983) ("Plaintiff [nursing care facility] is clearly not a 'participant' as defined in 29 U.S.C. § 1002(7)").

45. 575 F. Supp. 1243 (W.D. Pa. 1983).

46. *Id.* at 1245.

contained in 29 U.S.C. § 1055, rather than the patient's choice of facility. Finally, the declared purpose of the Act is to protect and educate those persons covered by such plans, and there is no indication that Congress intended by this statute to insure that health care facilities be paid. While Plaintiff may indeed be entitled to a "benefit" through operation of the plan—i.e., payment for services—we conclude that the term as employed in the statute does not permit of a construction broad enough to include a provider of health services to participants.<sup>47</sup>

The *Cameron* court's reasoning is highly questionable for several reasons. First, the court's statement that the term "[b]eneficiary" in the context of the various provisions of ERISA carries the connotation of a person, other than the employee-participant, who is covered by the plan's provisions—e.g., a spouse or dependent"<sup>48</sup> indicates that the court was of the opinion that in order to qualify as a beneficiary under ERISA one must be: (1) a natural person, and (2) "covered by the plan's provisions."<sup>49</sup> The court's view that only natural persons can qualify as beneficiaries under ERISA is erroneous. Specifically, the court failed to consider ERISA's definition of the term "person." The term "person," as used in ERISA generally, and in ERISA's definition of the term "beneficiary"<sup>50</sup> specifically, is broadly defined in section 1002(9) of ERISA to include "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization."<sup>51</sup> Clearly, then, a non-natural person such as a nursing care facility or hospital can qualify as a beneficiary under ERISA. Moreover, since non-natural persons can qualify as beneficiaries under ERISA, it follows that a person need not be "covered by the plan's provi-

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47. *Id.* at 1245-46.

48. *Id.* at 1245.

49. *Id.*

50. "The term 'beneficiary' means a *person* designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8) (1982) (emphasis added).

51. *Id.* § 1002(9).

[A] straightforward reading of the "person" definition shows it simply follows the theme common to a great many statutes: To save a constant repetition of terms in the substantive parts of the legislation, the draftsmen use a generic term ("person") throughout those substantive sections and then give that term its content in the definitions part of the statute. Section 1002(9) makes plain that all manner of *entities*, and not just the individual human beings commonly denoted by the term "person," are meant to be covered by the legislation.

*Gambino v. Index Sales Corp.*, 673 F. Supp. 1450, 1456 (N.D. Ill. 1987) (emphasis in original).

sions”<sup>52</sup> in the sense envisioned by the *Cameron* court in order to qualify as a beneficiary under ERISA. Presumably, for a person to be “covered by the plan’s provisions”<sup>53</sup> in the sense envisioned by the *Cameron* court the plan must be contractually obligated to pay for specified medical services rendered to the person. Obviously, since non-natural persons do not require health care they will never be “covered by the plan’s provisions”<sup>54</sup> in that sense. Nevertheless, as discussed above, non-natural persons can clearly qualify as beneficiaries under ERISA. It follows, then, that being “covered by the plan’s provisions”<sup>55</sup> in the sense envisioned by the *Cameron* court is not a prerequisite to qualifying as a beneficiary under ERISA.

Second, the *Cameron* court’s statement that “the act of ‘designation’ would appear to be such formal election as that contained in 29 U.S.C. § 1055, rather than the patient’s choice of facility”<sup>56</sup> is without foundation. It need only be noted that section 1055 is wholly inapplicable to employee welfare benefit plans such as the health care plan at issue in *Cameron*.<sup>57</sup> Therefore, section 1055 is of no assistance in determining the manner in which a participant in such a plan may “designate” a person as a beneficiary. In fact, ERISA is silent on the question of the manner in which a participant in an ERISA-governed employee welfare benefit plan may “designate” a person as a beneficiary. Therefore, courts must look beyond the statute to determine the manner in which a participant in an ERISA-governed employee welfare benefit plan may “designate” a person as a beneficiary.<sup>58</sup>

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52. *Cameron*, 575 F. Supp. at 1245.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Section 1051(1) of ERISA provides: “This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) *other than—(1) an employee welfare benefit plan . . .*” 29 U.S.C. § 1051(1) (1982) (emphasis added). Section 1055 of ERISA (29 U.S.C. § 1055) falls within the “part” referred to in section 1051(1). Therefore, section 1055 does not apply to welfare plans.

58. One way that a participant in an ERISA-governed employee welfare benefit plan might be able to designate a person as a beneficiary is by following the procedure set out in the plan itself. *See, e.g., Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 277 (7th Cir. 1990) (en banc) (“The Plan specifies how a participant may designate a beneficiary”). Another way that a participant in an ERISA-governed employee welfare benefit plan might designate a person as a beneficiary is by executing an assignment of benefits form naming the person as the assignee. *See Kennedy v. Deere & Co.*, 118 Ill. 2d 69, 514 N.E.2d 171 (1987) (assignment of benefits form naming health care provider as assignee of participant’s benefits constitutes “designation” by participant of health care provider as beneficiary), *aff’d* 142 Ill. App. 3d 781, 492 N.E.2d 199 (1986), *cert. denied*, 484 U.S. 1064 (1988).



Third, the *Cameron* court's statement that "the declared purpose of the Act is to protect and educate those persons covered by such plans, and there is no indication that Congress intended by this statute to insure that health care facilities be paid"<sup>59</sup> is internally inconsistent. If ERISA is construed as not providing health care providers with a statutory cause of action and, at the same time, as preempting any state law claims that they might otherwise have,<sup>60</sup> then health care providers, being unprotected under both state and federal law, would have to refuse to treat "persons covered by such plans"<sup>61</sup> unless they are capable of paying for services through sources other than the plan. If health care providers are forced to refuse to treat "persons covered by such plans,"<sup>62</sup> then the "declared purpose of the Act"<sup>63</sup>—"to protect . . . persons covered by such plans"<sup>64</sup>—will be defeated.

Fourth, the *Cameron* court's statement that "Plaintiff may indeed be entitled to a 'benefit' through operation of the plan—i.e., payment for services"<sup>65</sup> would arguably bring the plaintiff squarely

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For a thorough discussion of the *Kennedy* decision, see *infra* notes 77-87 and accompanying text. The lower appellate court in *Kennedy* suggested that a participant might also designate a person as beneficiary by executing a writing authorizing payment of the benefits directly to the person. The lower appellate court observed that the employee-patients had completed forms, separate and apart from the assignment forms, authorizing payment directly to the health care providers. See *Kennedy*, 142 Ill. App. 3d at 784, 492 N.E.2d at 201 (quoting from the assignment form and the authorization-to-pay form). The lower appellate court stated:

Defendant's challenge to the assignment/authorization-to-pay forms on grounds that they are not "formal designations" is not well taken. In *Cameron Manor*, the court contrasted the "formality" of an act of beneficiary "designation" to plaintiff's theory that by choosing to be treated at the plaintiff facility, defendant's employees "tacitly" transferred their right to claim benefits due under the defendant's health care plan. Under the *Cameron Manor* fact pattern there was no showing of any purposeful act performed by the plan participants or beneficiaries to transfer their right to claim benefits due for the services rendered by the provider. In contrast to *Cameron Manor* it is uncontested that plaintiffs here allege "formal," purposeful acts of executing two forms specifically drafted for the purpose of transferring to plaintiffs the right to claim benefits due and to receive them directly from the defendant's health care plan. No greater "formality" is required.

*Id.* at 786, 492 N.E.2d at 203 (emphasis added); see also *infra* note 94 (discussion of *Hermann Hospital* case: participant's "authorization" to pay benefits directly to health care provider arguably constitutes "designation" of health provider as beneficiary).

59. *Cameron*, 575 F. Supp. at 1245-46.

60. ERISA has been construed as preempting the state law claims of health care providers as against ERISA-governed employee health care plans. See cases cited at *supra* note 24.

61. *Cameron*, 575 F. Supp. at 1245.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 1246.

within ERISA's definition of the term "beneficiary." Section 1002(8) of ERISA defines the term "beneficiary" to include "a person designated . . . by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder."<sup>66</sup> Typically, the "benefit" that an employee health care plan provides is payment for medical services rendered;<sup>67</sup> the benefit is not the rendition of medical services.<sup>68</sup> Thus, an individual or entity who, by virtue of a provision in the plan, is or may become entitled to payment for medical services rendered is a beneficiary as defined in section 1002(8) of ERISA because the individual or entity "is or may become entitled to a benefit"<sup>69</sup> under the terms of the plan.<sup>70</sup> Since the nursing care facility in *Cameron* may have been "entitled to a 'benefit' through operation of the plan—i.e., payment for services,"<sup>71</sup> it seems clear that it fell squarely within ERISA's definition of the term beneficiary. Moreover, the fact that the nursing care facility in *Cameron* did not incur the medical expenses that caused the payment to become due under the plan is immaterial. This is so for at least two reasons. First, there is nothing in section 1002(8)'s definition of the term "beneficiary" to suggest that the person entitled to payment for medical ser-

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66. 29 U.S.C. § 1002(8) (1982) (emphasis added); see *MacLean v. Ford Motor Co.*, 831 F.2d 723, 728 (7th Cir. 1987) (emphasizing that the term beneficiary as defined in section 1002(8) of ERISA includes one designated "'by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder'" (emphasis in original) (quoting section 1002(8))); *Chambers v. Kaleidoscope, Inc. Profit Sharing Plan and Trust*, 650 F. Supp. 359, 366 (N.D. Ga. 1986) ("[A] 'beneficiary' is defined as a person 'who is or may become entitled to a benefit' under such a plan." (quoting section 1002(8))).

67. *Kennedy v. Deere & Co.*, 118 Ill. 2d 69, 74, 514 N.E.2d 171, 173 (1987) ("It is to be observed that under the defendant's plan the 'benefits' the participant is entitled to are limited to payments for medical care under the plan."), *aff'd* 142 Ill. App. 3d 781, 492 N.E.2d 199 (1986), *cert. denied*, 484 U.S. 1064 (1988); see also *R.M. Bowler Contract Hauling Co., Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 547 F. Supp. 783, 784 (S.D. Ill. 1982) ("Although the word 'benefit' is not specifically defined in ERISA, it is used . . . to mean traditional fringe benefits to which employees are entitled, such as medical, disability, unemployment and vacation benefits."); *Hibernia Bank v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 411 F. Supp. 478, 489 (N.D. Cal. 1976) ("The benefits to which a beneficiary must be entitled are, in general, 'fringe benefits' such as medical disability and vacation payments.").

68. *Kennedy*, 118 Ill. 2d at 74, 514 N.E.2d at 173 ("The defendant is not obligated contractually to provide the medical care but only to pay for it").

69. 29 U.S.C. § 1002(8) (1982).

70. For an example of a plan provision that arguably entitles a health care provider to payment for medical services rendered, see *Albert Einstein Medical Center v. National Benefit Fund for Hosp. and Health Care Employees*, No. 89-5931 (E.D. Pa. Dec. 20, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 156374) (plan contained the following provision: "The Fund will pay the hospital directly for all services covered by the plan"); see also the discussion of the *Hermann Hospital* case at *supra* note 94.

71. *Cameron*, 575 F. Supp. at 1246.

vices rendered (the "benefit") must be the person to whom the services were rendered. Second, as has been discussed, non-natural persons can qualify as beneficiaries under ERISA. Since non-natural persons can qualify as beneficiaries under ERISA, and since non-natural persons will never incur medical expenses as a result of having received medical treatment, it follows that incurring the medical expenses that cause the payment to become due under the plan is not a prerequisite to qualifying as a beneficiary under ERISA.

Finally, the *Cameron* court's statement that "the term [beneficiary] as employed in the statute does not permit of a construction broad enough to include a provider of health services to participants"<sup>72</sup> is simply erroneous. As already noted, the term "person" as used in ERISA's definition of the term "beneficiary" is broadly defined in section 1002(9) of ERISA to include "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust estate, unincorporated organization, association, or employee organization."<sup>73</sup> Therefore, the term "beneficiary" as defined in section 1002(8) of ERISA obviously "permit[s] of a construction broad enough to include a provider of health services to participants."<sup>74</sup> As noted by the Illinois Supreme Court in *Kennedy*

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72. *Id.*

73. 29 U.S.C. § 1002(9) (1982); see also *supra* note 51 (quotation from the *Gambino* case).

74. *Cameron*, 575 F. Supp. at 1246.

The *Cameron* court's reliance on *Hibernia Bank v. International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 411 F. Supp. 478 (N.D. Cal. 1976), as support for its conclusion that ERISA's definition of the term beneficiary is not broad enough to include a health care provider is questionable. In *Hibernia* the court addressed the issue of whether a bank was a beneficiary as defined in section 1002(8) of ERISA. The court stated:

The bank's amended complaint simply asserts its status as a beneficiary, an assertion that is amplified only slightly in the Bank's briefs, where the following argument is made:

"The benefit [*sic*] to which it is entitled is not a pension payment, or recompense for hospitalization charges, but it is a benefit payable from the corpus of the trust; payment of costs of administration is indeed specified in the trust instruments."

Although the word 'benefit' is not specifically defined by the Act, the Court is convinced that Congress did not intend to include an entity such as the Bank in the category of "beneficiaries". This conviction is supported by the definitions of "employee welfare benefit plan" and "welfare plan" in Section 3(1) of the Act, 29 U.S.C. § 1002(1). The benefits to which a beneficiary must be entitled are, in general, "fringe benefits" such as medical disability and vacation payments.

*Id.* at 489 (emphasis in original).

To begin with, the *Hibernia* court's statement that "Congress did not intend to include an entity such as the Bank in the category of 'beneficiaries,'" *id.*, is entirely erroneous. The *Hibernia* court, like the *Cameron* court, ignored the fact that ERISA's definition of the term "person" as that term is used in ERISA's definition of the term "beneficiary" includes entities.

*v. Deere & Co.*,<sup>75</sup> "Congress did not proscribe any qualifications for a beneficiary. . . . As ERISA as a whole is 'comprehensive and reticulated' . . . and '[t]he assumption of inadvertent omission is . . . especially suspect' . . . there can be no assumption that Congress intended to restrict the class of beneficiaries."<sup>76</sup>

The above discussion demonstrates that the *Cameron* decision was very poorly reasoned and is not persuasive authority.

## 2. *Kennedy v. Deere & Co.*

The only other case found that significantly addresses the issue of whether a health care provider can qualify as a beneficiary as defined in ERISA is the Illinois Supreme Court's decision in *Kennedy v. Deere & Co.*<sup>77</sup> In *Kennedy* the plaintiffs, chiropractors, rendered services to participants<sup>78</sup> in an ERISA-governed employee health care plan. In return, the participants assigned to the chiropractors the benefits to which they were entitled under the plan. The chiropractors, as assignees, submitted claims to the plan for payment. The plan refused to honor some of the assignments. The chiropractors then filed suit under ERISA asserting that they were beneficiaries as defined in section 1002(8) of ERISA and that, as such, they were expressly empowered by section 1132(a)(1)(B) of ERISA

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See 29 U.S.C. § 1002(9) (1982); see also *supra* note 51 (quotation from the *Gambino* case).

More important, however, is the fact that in *Hibernia* the "benefit" that the bank was claiming to be entitled to—payment of costs of administration—was *not* the sort of benefit that the plan was designed to provide. This fact appears to have weighed heavily in the *Hibernia* court's decision, as evidenced by the court's statement that "[t]he benefits to which a beneficiary must be entitled are, in general, 'fringe benefits' such as *medical disability and vacation payments*." *Hibernia*, 411 F. Supp. at 489 (emphasis added).

In *Cameron*, by contrast, the benefit that the nursing care facility was claiming to be entitled to—payment for covered medical expenses—was the precise benefit that the plan was designed to provide. This distinction, coupled with the fact that the *Hibernia* court erroneously concluded that only natural persons can qualify as beneficiaries under ERISA, suggests that the *Cameron* court's reliance on *Hibernia* was misplaced.

75. 118 Ill. 2d 69, 514 N.E.2d 171 (1987), *aff'd* 142 Ill. App. 3d 781, 492 N.E.2d 199 (1986), *cert. denied*, 484 U.S. 1064 (1988).

76. *Id.* at 74, 514 N.E.2d at 173 (citations omitted) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980) and *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)); see also *Sladek v. Bell Sys. Management Pension Plan*, 880 F.2d 972, 976 (7th Cir. 1989) (the term beneficiary as defined in section 1002(8) of ERISA should be broadly construed).

77. 118 Ill. 2d 69, 514 N.E.2d 171 (1987), *aff'd* 142 Ill. App. 3d 781, 492 N.E.2d 199 (1986), *cert. denied*, 484 U.S. 1064 (1988).

78. It can be implied from the Illinois Supreme Court's opinion that the court was of the belief that the patients were participants. The lower appellate court, however, expressly characterized the patients as "participants or beneficiaries." *Kennedy*, 142 Ill. App. 3d at 782, 492 N.E.2d at 200 (emphasis added).

to sue to recover benefits due under the plan.<sup>79</sup> The defendant moved to dismiss the chiropractors' suit alleging that the chiropractors "lacked standing to sue under ERISA."<sup>80</sup> The defendant argued that "although plan participants may 'designate' a 'beneficiary' who will then be entitled to benefits under the plan, a participant may designate only members of his family or other dependents."<sup>81</sup> Health care providers, argued the defendant, "cannot be designated by a participant to receive benefits under a plan."<sup>82</sup> The Illinois Supreme Court rejected the defendant's argument stating:

*Congress did not proscribe any qualifications for a beneficiary. Section 206(d) [29 U.S.C. § 1056(d)] of ERISA . . . prohibits the assignment of pension benefits, but there is nothing in ERISA or in the legislative history showing a congressional intent to prohibit assignments of health care benefits or to limit the class of persons a participant is permitted to designate to receive benefits under a health care plan. As ERISA as a whole is "comprehensive and reticulated" . . . and "[t]he assumption of inadvertent omission is especially suspect" . . . there can be no assumption that Congress intended to restrict the class of beneficiaries.<sup>83</sup>*

The court went on to hold that "when an employee-participant assigns his right to benefits under the plan to the health care provider, the provider can bring an action under ERISA to enforce that right."<sup>84</sup> Thus, the court in effect held that an assignment of benefits by a participant to a health care provider constitutes a "designation" of the health care provider as a beneficiary for purposes of section 1002(8) of ERISA and the health care provider, as a beneficiary, is expressly empowered by section 1132(a)(1)(B) of ERISA to sue to recover the benefits.

The *Kennedy* decision is much better reasoned than the *Cameron* decision. First, the *Kennedy* court, unlike the *Cameron* court, correctly recognized that ERISA places no limitations on the class of persons who can qualify as a beneficiary. In holding that a participant may designate a health care provider as a beneficiary, the *Kennedy* court rejected the *Cameron* court's erroneous view that in order

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79. *Kennedy*, 118 Ill. 2d at 71, 514 N.E.2d at 172.

80. *Id.* at 70, 514 N.E.2d at 171.

81. *Id.* at 73, 514 N.E.2d at 172-73.

82. *Id.* at 73, 514 N.E.2d at 173.

83. *Id.* at 74, 514 N.E.2d at 173 (emphasis added) (citations omitted) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980) and *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985)).

84. *Id.* at 76, 514 N.E.2d at 174.

to qualify as a beneficiary under ERISA one must be: (1) a natural person, and (2) covered by the plan's provisions.

Second, in determining the manner in which a participant in an ERISA-governed employee welfare benefit plan may "designate" a person as a beneficiary for purposes of section 1002(8) of ERISA, the *Kennedy* court, unlike the *Cameron* court, did not look to section 1055 of ERISA—a clearly inapplicable provision. Rather, the court, after implicitly recognizing that ERISA is silent on the question of the manner in which a participant in an ERISA-governed employee welfare benefit plan may "designate" a person as a beneficiary, looked to logic and common sense. The Court concluded that the execution by a participant of an assignment of benefits form qualifies as a "designation" for purposes of section 1002(8) of ERISA. This conclusion was sound. An assignment of benefits form clearly and unambiguously evidences the desire and intent of the participant that the benefits be paid to the named assignee. Nothing more should be required. Moreover, an assignment of benefits form, in any event, clearly meets the *Cameron* court's "formal election" requirement. As the lower appellate court in *Kennedy* noted:

In contrast to *Cameron Manor* it is uncontested that plaintiffs here allege "formal," purposeful acts of executing two forms specifically drafted for the purpose of transferring to plaintiffs the right to claim benefits due and to receive them directly from the defendant's health care plan. No greater "formality" is required.<sup>85</sup>

Finally, the *Kennedy* court in practical effect rejected the *Cameron* court's suggestion that Congress, in enacting ERISA, did not intend that health care providers be paid for their services. The *Kennedy* court, unlike the *Cameron* court, recognized that if health care providers are held to have no standing to sue under ERISA they will be unprotected under both state and federal law<sup>86</sup> and will thus be forced to refuse to treat persons covered by ERISA-governed employee health care plans unless they are capable of paying for services through sources other than the health care plan. Such a result Congress could never have intended.<sup>87</sup>

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85. *Kennedy*, 142 Ill. App. 3d at 786, 492 N.E.2d at 203.

86. *Kennedy*, 118 Ill. 2d at 75, 514 N.E.2d at 174 ("If assignees are barred from bringing an action under ERISA they would necessarily be without a remedy" because "section 514(a) [29 U.S.C. § 1144(a)] of ERISA . . . would prohibit an assignee from acting under State law to establish a legal claim to benefits under a plan").

87. It must be noted that the Illinois Supreme Court's decision in *Kennedy* is not without problems. For example, the court stated that the lower appellate court held "that the

### 3. Summary

#### The law on the issue of whether a health care provider can

plaintiffs, as assignees of a participant's right to receive benefits under the plan, are 'beneficiaries' within section 3(8) [29 U.S.C. § 1002(8)] of ERISA." *Id.* at 72, 514 N.E.2d at 172 (emphasis added). This statement misconstrues the lower appellate court's opinion. Although the lower appellate court concluded that the execution by a participant of an assignment of benefits form and/or a form authorizing the plan to pay the benefits due directly to a health care provider qualifies as a "designation" for purposes of section 1002(8) of ERISA, see *supra* note 58 (quotation from the lower appellate court opinion), the court did not carry this conclusion to its logical end. In other words, after reaching this conclusion, the lower appellate court, for reasons that are not clear, did not then proceed to reason that the chiropractors had standing to sue *in their own right* under section 1132(a)(1)(B) under the theory that they had been "designated" as beneficiaries by participants for purposes of section 1002(8) of ERISA. Rather, the lower appellate court reasoned that the chiropractors, as assignees, "ha[d] standing to sue as the 'participant' or 'beneficiary' in whose shoes [they stood] for purposes of section 1132(a)(1)(B)." *Kennedy*, 142 Ill. App. 3d at 787, 492 N.E.2d at 203 (emphasis added). Thus, the lower appellate court was clearly employing a "derivative standing" theory rather than the "designation of beneficiary" theory employed by the Illinois Supreme Court. For a thorough discussion of the derivative standing theory, see *infra* notes 95-177 and accompanying text (Section II.B. *Derivative Standing by Virtue of an Assignment of Benefits*). And, in fact, the lower appellate court could not properly have employed the Illinois Supreme Court's "designation of beneficiary" theory because the lower appellate court characterized the assignors as "participants or beneficiaries," *id.* at 782, 492 N.E.2d at 200 (emphasis added), rather than as just participants as the Illinois Supreme Court implicitly characterized them. See *supra* note 78. Section 1002(8) of ERISA empowers only participants to "designate" beneficiaries. Thus, had the assignors in *Kennedy* in fact been beneficiaries rather than participants (as the lower appellate court's opinion suggests they might have been), they would not have been empowered to designate the chiropractors as beneficiaries. It follows, then, that in light of the lower appellate court's characterization of the assignors as "participants or beneficiaries," *id.*, the only theory of standing that the lower appellate court could safely have employed is the "derivative standing" theory because that theory can be employed when the assignor is either a participant or a beneficiary. See *infra* note 98 and accompanying text.

The Illinois Supreme Court also stated that the Ninth Circuit in *Misic v. Building Serv. Employees Health and Welfare Trust*, 789 F.2d 1374 (9th Cir. 1986), held "that Congress did not intend to prohibit a participant of a health benefit plan from designating a health care provider as a beneficiary." *Kennedy*, 118 Ill. 2d at 76, 514 N.E.2d at 174. The Ninth Circuit in *Misic* never held that a participant may "designate" a health care provider as a beneficiary. To begin with, the assignor-patients in *Misic* were beneficiaries, not participants. Since section 1002(8) of ERISA empowers only participants to "designate" beneficiaries, it follows that the assignors in *Misic* would not have been empowered to "designate" the health care provider, Dr. Peter Misic, as a beneficiary unless it could somehow be said that in addition to being beneficiaries, the assignors qualified as participants. Moreover, the Ninth Circuit never stated that Dr. Peter Misic had standing to sue *in his own right* under ERISA under the theory that he had been "designated" a beneficiary by a participant for purposes of section 1002(8) of ERISA. Rather, the Ninth Circuit concluded that "Dr. Misic, as assignee of beneficiaries pursuant to assignments valid under ERISA, has standing to assert the claims of his assignors." *Misic*, 789 F.2d at 1379 (emphasis added) (footnote omitted). The Ninth Circuit specifically stated that Dr. Misic was not "a suitor in his own right," but rather was suing "as assignee of beneficiaries." *Id.* at 1378. Dr. Misic, in the Ninth Circuit's words, "stood in the shoes" of the assignor-beneficiaries. *Id.* The Illinois Supreme Court clearly misinterpreted the *Misic* decision in this regard.

Despite the Illinois Supreme Court's apparent confusion concerning the distinction be-

qualify as a beneficiary under ERISA is unsettled. The *Cameron* court concluded that as a matter of law a health care provider can never qualify as a beneficiary under ERISA. The *Cameron* opinion, however, does not withstand even the slightest scrutiny. The opinion ignores ERISA provisions that are clearly applicable<sup>88</sup> and applies provisions that are clearly inapplicable.<sup>89</sup> The opinion notes that one of ERISA's purposes is to protect persons covered by employer-sponsored health care plans but then, ironically, proceeds to reach a result that defeats that very purpose.<sup>90</sup> The opinion refuses to read ERISA's provisions as meaning what they say,<sup>91</sup> and restricts the meaning of terms used in ERISA where nothing in the statute or legislative history indicates that such restrictions were ever intended.<sup>92</sup>

The Illinois Supreme Court in *Kennedy*, on the other hand, concluded that a health care provider can qualify as a beneficiary under ERISA. The court recognized that Congress placed no restrictions on the class of persons who can qualify as a beneficiary and held that a participant can designate a health care provider as a beneficiary by assigning his or her benefits to the health care provider. The *Kennedy* decision is consistent with ERISA's provisions and with "the intent of Congress in providing under ERISA for health and welfare benefit plans"<sup>93</sup> and therefore is much better reasoned than *Cameron*.<sup>94</sup>

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tween the "derivative standing" theory and the "designation of beneficiary" theory, the reasoning employed by the court was sound, and the result it reached was certainly correct.

88. The opinion ignores ERISA's definition of the term "person." See *supra* notes 48-55 & 72-76 and accompanying text.

89. The opinion applies section 1055 of ERISA, a clearly inapplicable provision. See *supra* notes 56-58 and accompanying text.

90. See *supra* notes 59-64 and accompanying text.

91. The opinion refuses to read ERISA's definition of the term "beneficiary" as meaning what it says. See *supra* notes 65-71 and accompanying text.

92. The opinion unduly restricts ERISA's definition of the term "beneficiary." See *supra* notes 72-76 & 48-55 and accompanying text.

93. *Kennedy*, 118 Ill. 2d at 74, 514 N.E.2d at 173.

94. Two federal district courts have recently adopted the *Cameron* court's construction of the term "beneficiary." See *Albert Einstein Medical Center v. National Benefit Fund For Hosp. and Health Care Employees*, No. 89-5931 (E.D. Pa. Dec. 20, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 156374) (the hospitals do not "qualify as 'beneficiaries' in their own right" (citing *Cameron*)); *Pritt v. Blue Cross & Blue Shield, Inc.*, 699 F. Supp. 81, 84-85 (S.D. W. Va. 1988). Neither opinion, however, analyzes the *Cameron* opinion and therefore neither opinion is persuasive.

The Fifth Circuit in *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286 (5th Cir. 1988) had an opportunity to address the issue of whether a health care provider can qualify as a beneficiary under ERISA but chose not to. In *Hermann Hospital*, Patricia Nicholas, the spouse of a participant in an ERISA-governed employee health care plan, sought



## B. *Derivative Standing By Virtue of an Assignment of Benefits*

As discussed in the previous section, the Illinois Supreme Court

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medical treatment from Hermann Hospital. After verifying through a MEBA agent that Nicholas was covered by the plan, hospital administrators had Nicholas execute to the hospital an assignment of benefits. *Id.* at 1287. The hospital thereafter rendered services to Nicholas until her death approximately six months after her admission to the hospital. *Id.* The services rendered were valued at \$341,920.96. The hospital submitted claims to the plan but the plan refused to pay the claims. *Id.* The hospital then filed suit against the plan under section 1132(a)(1)(B) of ERISA. *Id.* at 1286. The hospital also asserted state common law claims for breach of fiduciary duty, negligence, equitable estoppel, breach of contract and fraud. *Id.* The plan filed a motion to dismiss arguing that the hospital's state common law claims were preempted by ERISA and that the hospital lacked standing to sue under section 1132(a)(1)(B) of ERISA. The district court granted the plan's motion, and the hospital appealed to the Fifth Circuit. *Hermann Hosp.*, No. 85-6800 (S.D. Tex. May 20, 1987) (WESTLAW, ALLFEDS Database, 1987 WL 11723), *aff'd in part, rev'd in part and remanded*, 845 F.2d 1286 (5th Cir. 1988).

On appeal, the hospital contended that it had standing to sue under ERISA under at least two theories. First, the hospital contended that as the assignee of a plan beneficiary it had standing, derivatively, to assert the claims of the beneficiary in whose shoes it stood under section 1132(a)(1)(B). *Hermann Hosp.*, 845 F.2d at 1287. Second, the hospital argued that it had standing to sue under ERISA under the theory that the list of persons expressly empowered by section 1132(a) of ERISA to sue is not exclusive. *Id.* The hospital did not, in the Fifth Circuit's view, contend that it had standing to sue under section 1132(a)(1)(B) of ERISA under the theory that it was a beneficiary as defined in section 1002(8) of ERISA. *Id.* ("Hermann does not contend that it falls among the parties statutorily authorized by § 1132(a)."). However, a review of the record indicates that the hospital filed two supplemental briefs asserting that it had standing to sue under section 1132(a)(1)(B) of ERISA under the theory that it was a beneficiary as defined in section 1002(8) of ERISA. Though unclear, the Fifth Circuit apparently was of the opinion that Hermann Hospital was making this argument for the first time on appeal as evidenced by a statement to that effect in the Fifth Circuit's order granting the hospital permission to file its first supplemental brief. In any event, the arguments made by the hospital in its supplemental briefs merit discussion notwithstanding the fact that the Fifth Circuit declined to consider them.

In its second supplemental brief the hospital called the court's attention to the following provision in the MEBA plan: "[A]n eligible employee may *authorize* the Plan to make payment directly to a provider of services for covered medical expenses hereunder . . . ." MEBA 1983 Summary Plan Description at 54 (Article XVI, provision 4) (emphasis added), *quoted in* Supplemental Brief for Plaintiff-Appellant at 2 (filed Mar. 3, 1988), *Hermann Hosp.*, 845 F.2d 1286 (5th Cir. 1988). The hospital argued that this provision raised a question of fact that had not been resolved at the trial level as to whether Robert Nicholas—the surviving spouse of Patricia Nicholas and an employee-participant under the MEBA plan—had "authorized" the plan to pay the benefits due Patricia Nicholas' estate directly to the hospital. According to the hospital's argument, if the fact-finder were to find that Robert Nicholas had "authorized" the plan to pay the benefits due Patricia Nicholas' estate directly to the hospital, the hospital could then claim the status of a beneficiary as defined in section 1002(8) of ERISA under the theory that under the terms of the MEBA plan the hospital "is or may become entitled to a benefit," 29 U.S.C. § 1002(8) (1982), and/or under the theory that the "authorization" constituted a "designation" by the participant, Robert Nicholas, of the hospital as a beneficiary. The hospital, as support for its contention that Robert Nicholas had "authorized" the plan to pay the benefits due Patricia Nicholas' estate directly to it, quoted the following testimony from the deposition of Robert Nicholas:

Q: Mr. Nicholas, if anyone *pays Hermann Hospital* any part of this

in *Kennedy v. Deere & Co.*<sup>95</sup> held that an assignment of benefits by a participant to a health care provider constitutes a "designation" of the health care provider as a beneficiary for purposes of section 1002(8) of ERISA and the health care provider, as a beneficiary, is expressly empowered by section 1132(a)(1)(B) of ERISA to sue to recover the benefits. This "designation of beneficiary" theory is one of two theories under which an assignment of benefits has been held to give a health care provider standing to sue under ERISA. The other theory is the derivative standing theory. As will become clear from the discussion that follows, the derivative standing theory differs from the "designation of beneficiary" theory in several important respects. First, under the derivative standing theory the assignment does not give the assignee-health care provider standing to sue *in its own right* as it does under the "designation of beneficiary" theory but rather gives the assignee-health care provider standing to sue as the assignor in whose shoes it stands.<sup>96</sup> Second, under the

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\$341,000.00, as between yourself and MEBA, who do you think should pay it?

A: MEBA.

Deposition of Robert E. Nicholas at 65 (May 14, 1986) (emphasis added), *quoted in* Supplemental Brief for Plaintiff-Appellant at 4 (filed Mar. 3, 1988), *Hermann Hosp.*, 845 F.2d 1286 (5th Cir. 1988).

The hospital argued that in light of the above deposition testimony, and in light of the fact that Robert Nicholas had never in five years submitted a claim to the plan for the benefits due Patricia Nicholas' estate, it would be difficult for the plan to argue with any degree of credibility that Robert Nicholas had not "authorized" it, either expressly or impliedly, to pay the benefits due Patricia Nicholas' estate directly to the hospital.

The hospital's argument, though unaddressed by the Fifth Circuit, had merit. If Robert Nicholas, an employee-participant under the MEBA plan, had "authorized" MEBA to pay the benefits due Patricia Nicholas' estate directly to the hospital, the hospital would arguably have been a beneficiary as defined in section 1002(8) of ERISA under the theory that it was "entitled to a benefit" under the MEBA plan pursuant to the provision in the plan allowing "an eligible employee [to] authorize the Plan to make payment directly to a provider of services for covered medical expenses hereunder . . . ." MEBA 1983 Summary Plan Description at 54 (Article XVI, provision 4) (emphasis added), *quoted in* Supplemental Brief for Plaintiff-Appellant at 2 (filed Mar. 3, 1988), *Hermann Hosp.*, 845 F.2d 1286 (5th Cir. 1988). Moreover, as the hospital argued, for an employee-participant in an ERISA-governed employee health care plan to authorize the plan to pay benefits due under the plan directly to a health care provider arguably constitutes a "designation" by the participant of the health care provider as a beneficiary for purposes of section 1002(8) of ERISA.

95. 118 Ill. 2d 69, 514 N.E.2d 171 (1987), *aff'g* 142 Ill. App. 3d 781, 492 N.E.2d 199 (1986), *cert. denied*, 484 U.S. 1064 (1988).

96. See *Misic v. Building Serv. Employees Health and Welfare Trust*, 789 F.2d 1374, 1379 (9th Cir. 1986) ("We conclude Dr. Misic, as assignee of beneficiaries pursuant to assignments valid under ERISA, has standing to assert the claims of his assignors." (emphasis added) (footnote omitted)); *Kennedy*, 142 Ill. App. 3d at 787, 492 N.E.2d at 203 ("[W]here an ERISA plan participant or beneficiary voluntarily elects in a signed writing to assign his rights to claim health insurance benefits to the provider of health care services, such assignee has standing to sue as the 'participant' or 'beneficiary' in whose shoes he stands for purposes of

derivative standing theory the assignment must be "valid" before the health care provider can be found to have standing.<sup>97</sup> Under the "designation of beneficiary" theory, by contrast, the assignment arguably need not be valid because the assignment form is viewed not as an assignment per se but rather as constituting the participant's "designation" of the health care provider as a beneficiary for purposes of section 1002(8) of ERISA. There is nothing in ERISA or case law to suggest that in order for a writing to constitute a "designation" of a person as a beneficiary for purposes of section 1002(8) of ERISA the writing must effect an assignment of benefits. Thus, an assignment of benefits form, while it might for some technical reason fail to effect an assignment of benefits (thus defeating "derivative standing"), may nevertheless constitute a "designation" of the health care provider as a beneficiary for purposes of section 1002(8) of ERISA and thereby give the health care provider standing to sue in its own right. Finally, and perhaps most importantly from the health care provider's perspective, the derivative standing theory can be used when the assignor is a participant *or a beneficiary* such as the spouse of an employee-participant,<sup>98</sup> whereas the "designation of beneficiary" theory can be used only when the assignor is a participant because under section 1002(8) of ERISA only a participant can "designate" a beneficiary.

1. *Misic v. Building Service Employees Health and Welfare Trust*

The leading case on the issue of whether an assignment of benefits gives a health care provider derivative standing to sue under section 1132(a)(1)(B) of ERISA is *Misic v. Building Service Employees Health and Welfare Trust*.<sup>99</sup> In *Misic*, Dr. Peter Misic rendered dental services to beneficiaries in an ERISA-governed em-

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section 1132(a)(1)(B))." (emphasis added)).

97. See *Hermann Hosp.*, 845 F.2d at 1289 (hospital's contention that it has derivative standing by virtue of assignment "assumes that . . . a valid assignment has been made"); *Misic*, 789 F.2d at 1378 ("a valid assignment confers upon the assignee standing to sue in place of the assignor").

98. See *Misic*, 789 F.2d at 1379 ("Dr. Misic, as assignee of *beneficiaries* pursuant to assignments valid under ERISA, has standing to assert the claims of his assignors." (emphasis added) (footnote omitted)); *Kennedy*, 142 Ill. App. 3d at 787, 492 N.E.2d at 203 ("[W]here an ERISA plan participant *or beneficiary* voluntarily elects in a signed writing to assign his rights to claim health insurance benefits to the provider of health care services, such assignee has standing to sue as the 'participant' or 'beneficiary' in whose shoes he stands for purposes of section 1132(a)(1)(B))." (emphasis added)).

99. 789 F.2d 1374 (9th Cir. 1986).

ployee health care plan. In return, the beneficiaries assigned to Dr. Misic the benefits due them under the plan. The plan called for payment of 80 percent of the cost of the beneficiaries' dental care. Dr. Misic billed the plan directly. The plan paid a portion of the amount billed but less than the full 80 percent. Dr. Misic sued the plan under section 1132(a)(1)(B) of ERISA to recover the amount not paid.<sup>100</sup> In determining whether Dr. Misic had standing to assert the cause of action provided for in section 1132(a)(1)(B) of ERISA, the Ninth Circuit engaged in a two-part inquiry: (1) does ERISA's anti-assignment/anti-alienation provision, section 1056(d)(1),<sup>101</sup> prohibit an assignment of health care benefits, and (2) if not, does an assignee of a beneficiary have standing to sue under ERISA?

With respect to whether section 1056(d)(1) prohibits an assignment of health care benefits, the court first noted that this section, which states that "[e]ach *pension* plan shall provide that benefits provided under the plan may not be assigned or alienated,"<sup>102</sup> applies by its own terms only to pension plans and therefore has no effect on welfare plans.<sup>103</sup> Further, the court noted that "Part 2" of ERISA,<sup>104</sup> in which section 1056(d)(1) is found, is entirely inapplicable to welfare plans.<sup>105</sup>

After recognizing the inapplicability of section 1056(d)(1), the court went on to note that neither the specific purpose of section 1056(d)(1)<sup>106</sup> nor the general policies of ERISA would be served by prohibiting an assignment of health care benefits. The court stated:

Health and welfare benefit trust funds are designed to finance health care. Assignment of trust monies to health care providers results in precisely the benefit the trust is designed to provide and the statute is designed to protect. Such assignments also protect beneficiaries by making it unnecessary for health care providers to evaluate the solvency of patients before commencing medical treatment, and by eliminating the necessity for beneficiaries to pay potentially large medical bills and await compen-

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100. Dr. Misic also asserted state law claims sounding in tort and unfair business practices. *Id.* at 1376. Those claims were held to be preempted. *Id.* at 1379.

101. 29 U.S.C. § 1056(d)(1) (1982).

102. *Id.* (emphasis added).

103. *Misic*, 789 F.2d at 1376.

104. 29 U.S.C. §§ 1051-1061 (1982 & Supp. V 1987).

105. *Misic*, 789 F.2d at 1376. The court observed that Part 2's "Coverage" provision provides: "This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) *other than—(1) an employee welfare benefit plan . . .*" 29 U.S.C. § 1051(1) (1982) (emphasis added).

106. For a discussion of section 1056(d)(1) and its purpose, see *infra* note 149.

sation from the plan. Moreover, assignments permit a trust fund to obtain improved benefits for beneficiaries by bargaining with health care providers for better coverage and lower rates.<sup>107</sup>

Based on these observations the court reached the inescapable conclusion that section 1056(d)(1) does not prohibit an assignment of health care benefits.<sup>108</sup> The court noted that the Department of Labor, which is charged with ERISA's enforcement, "supports this interpretation of the statute."<sup>109</sup>

After concluding that the assignments to Dr. Misisic were not prohibited by ERISA, the Misisic court went on to conclude that under federal common law<sup>110</sup> assignment principles Dr. Misisic, as assignee, stood in the shoes of the beneficiaries, as assignors. Because the beneficiaries had standing under section 1132(a)(1)(B) of ERISA to sue to recover benefits due under the plan, the court concluded

107. *Misisic*, 789 F.2d at 1377.

108. *Id.* ("For these reasons we conclude ERISA does not forbid assignment by a beneficiary of his right to reimbursement under a health care plan to the health care provider." (footnote omitted)).

The *Misisic* court's conclusion that section 1056(d)(1) does not prohibit an assignment of health care benefits was recently confirmed by the United States Supreme Court in *Mackey v. Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825 (1988). The Court stated:

ERISA § 206(d)(1) [29 U.S.C. § 1056(d)(1)] bars (with certain enumerated exceptions) the alienation or assignment of benefits provided for by ERISA pension benefit plans. 29 U.S.C. § 1056(d)(1). Congress did not enact any similar provision applicable to ERISA welfare benefit plans, such as the one at issue in this case. . . .

Ultimately, in examining §§ 206(d)(1) [29 U.S.C. § 1056(d)(1)] and 514(a) [29 U.S.C. § 1144(a)] there is no ignoring the fact that, when Congress was adopting ERISA, it had before it a provision to bar the alienation or garnishment of ERISA plan benefits, and chose to impose that limitation only with respect to ERISA pension benefit plans and *not* ERISA welfare benefit plans. In a comprehensive regulatory scheme like ERISA, such omissions are significant ones. . . . Once Congress was sufficiently aware of the prospect that ERISA plan benefits could be attached and or garnished—as evidenced by its adoption of § 206(d)(1) [29 U.S.C. § 1056(d)(1)]—Congress' decision to remain silent concerning the attachment or garnishment of ERISA welfare plan benefits "acknowledged and accepted the practice, rather than prohibiting it." . . . We therefore conclude that Congress did not intend to preclude state-law attachment of ERISA welfare plan benefits.

*Id.* at 836-38 (emphasis in original) (citations and footnote omitted) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 516 (1981)); see also *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120-21 (7th Cir. 1989) (endorsing the Supreme Court's view in *Mackey* "that the anti-alienation provision of ERISA . . . does not apply to welfare benefit plans"). For a thorough discussion of *Mackey*, see *infra* notes 199-228 and accompanying text (Section III. GARNISHMENT OF EMPLOYEE WELFARE BENEFITS).

109. *Misisic*, 789 F.2d at 1377 n.2.

110. Congress intended for federal courts to develop a federal common law of employee benefit plans. See *infra* text accompanying note 121, and *infra* note 122.

that Dr. Misic had standing, derivatively, to sue to recover benefits due under the plan. The court stated:

The remaining question is whether, under federal common law, the assignee of beneficiaries has standing to sue under ERISA.

ERISA provides civil actions may be brought under the statute by participants, beneficiaries, fiduciaries, and the Secretary of Labor. 29 U.S.C. § 1132(a). The trust and the Department contend that only the parties named in section 1132 have standing to sue under ERISA, and assignees are not named. The trust also contends Dr. Misic lacks standing under the three-part test for implied statutory standing outlined in *Fentron Industries Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1304 (9th Cir. 1982).

These arguments mistakenly treat Dr. Misic as a suitor in his own right. Dr. Misic sues derivatively, as assignee of beneficiaries. As paragraph 12 of the complaint alleges, Dr. Misic "stands in the shoes of the beneficiaries;" and Dr. Misic's assignors, beneficiaries under the Act, are expressly authorized by section 1132(a)(1)(B) to sue to recover benefits due under a plan.

. . . .

We conclude Dr. Misic, as assignee of beneficiaries pursuant to assignments valid under ERISA, has standing to assert the claims of his assignors.<sup>111</sup>

The *Misic* decision is consistent with ERISA's provisions and policies and therefore is persuasive. The decision was recently cited with approval by the United States Supreme Court in *Mackey v. Lanier Collections Agency & Service, Inc.*,<sup>112</sup> and followed by the Fifth Circuit in *Hermann Hospital v. MEBA Medical & Benefits Plan*.<sup>113</sup>

## 2. *Hermann Hospital v. MEBA Medical & Benefits Plan*

In *Hermann Hospital*<sup>114</sup> the Fifth Circuit recognized the negative consequences that would follow if health care providers, as assignees of beneficiaries and participants in ERISA-governed employee health care plans, were denied standing to sue under ERISA. The court stated:

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111. *Misic*, 789 F.2d at 1378-79.

112. 486 U.S. 825, 832 n.6 (1988).

113. 845 F.2d 1286 (5th Cir. 1988).

114. The facts of this case are discussed in detail at *supra* note 94.

To deny standing to health care providers as assignees of beneficiaries of ERISA plans might *undermine Congress' goal of enhancing employees' health and welfare benefit coverage*. Many providers seek assignments of benefits to avoid billing the beneficiary directly and upsetting his finances and to reduce the risk of non-payment. If their status as assignees does not entitle them to federal standing against the plan, providers would either have to rely on the beneficiary to maintain an ERISA suit, or they would have to sue the beneficiary. Either alternative, indirect and uncertain as they are, would *discourage providers from becoming assignees and possibly from helping beneficiaries who were unable to pay them "up-front."* The providers are better situated and financed to pursue an action for benefits owed for their services.<sup>115</sup>

Although the Fifth Circuit concluded that a health care provider that has been assigned the benefits due a beneficiary under an ERISA-governed employee health care plan has standing, derivatively, to sue under ERISA as the beneficiary in whose shoes it stands, the court was unable to determine whether Hermann Hospital—the plaintiff in the case—had derivative standing because it was unable to determine, based on the record before it, whether Hermann Hospital qualified as an assignee. The court stated:

Mrs. Nicholas apparently executed a form assignment of benefits when she entered the hospital, but MEBA contends such assignments were not permitted by its plan at that time. Hermann responds that even if the executed assignment is invalid, MEBA is estopped, by its deceptive assurances of coverage, from denying Hermann's assignment. Hermann alternatively implies that, regardless of its specific plan provision, MEBA had in practice accepted assignments to health care providers. The district court did not address any of these issues, and we leave them for the district court on remand.<sup>116</sup>

The provision in the plan which MEBA contended prohibited Patricia Nicholas from assigning her benefits to Hermann Hospital provides in pertinent part that

No employee, dependent or beneficiary shall have the *right* to assign, alienate, transfer, sell, hypothecate, mortgage, encumber, pledge, commute, or anticipate any benefit payment hereunder, and any such payment shall not be subject to any legal process to levy execution upon or attachment or garnishment

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115. *Hermann Hosp.*, 845 F.2d at 1289 n.13 (emphasis added).

116. *Id.* at 1290 (footnote omitted).

proceedings against for the payment of any claims . . . .<sup>117</sup>

This provision is essentially a "spendthrift" provision of the MEBA plan.<sup>118</sup> Assuming for purposes of argument that as a matter of con-

117. MEBA 1983 Summary Plan Description at 54 (Article XVI, provision 4) (emphasis added), quoted in Brief of Defendant-Appellee at 27-28, *Hermann Hosp.*, 845 F.2d 1286 (5th Cir. 1988).

118. Direct support for this proposition is found in two cases involving ERISA welfare plans. In *Electrical Workers, Local No. 1 Credit Union v. IBEW-NECA Holiday Trust Fund*, 583 S.W.2d 154 (Mo. 1979) (en banc), the court was construing a provision in an ERISA welfare plan similar to the provision in the MEBA plan. The court characterized the provision as "a standard 'spendthrift' provision of the Trust." *Id.* at 157. For a thorough discussion of the *Electrical Workers* case, see *infra* notes 150-61 and accompanying text.

In *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 204 Cal. App. 3d 955, 251 Cal. Rptr. 597 (1988), the ERISA welfare plan at issue contained provisions similar to the provision in the MEBA plan. The court stated: "The trust is a 'spendthrift' trust designed to insure that the individual laborer does not dissipate the vacation fund until he or she is eligible for each year's lump sum payment." *Id.* at 958, 251 Cal. Rptr. at 598 (emphasis added) (footnote omitted). After making this statement, the court dropped a footnote and quoted the provisions in question. Thus, those provisions were considered spendthrift provisions, and made the trust a spendthrift trust. See also *Franchise Tax Bd.*, 679 F.2d 1307, 1308 (9th Cir. 1982) ("The Trust is a spendthrift trust"), vacated on jurisdictional grounds, 463 U.S. 1 (1983). For a detailed discussion of the California Court of Appeals' decision in the *Franchise Tax Board* case, see *infra* notes 162-74 and accompanying text.

Support for the proposition that the provision in the MEBA plan is a spendthrift provision is also found in cases involving ERISA pension plans. See, e.g., *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 897 F.2d 275, 278 (7th Cir. 1990) (referring to statutorily-mandated anti-assignment/anti-alienation provisions in ERISA pension plans as spendthrift provisions).

Clearly, then, the provision at issue in the MEBA plan is a standard spendthrift provision. Moreover, the MEBA plan is a trust. See 29 U.S.C. § 1103(a) (1982) ("Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees."); see also H.R. REP. NO. 533, 93rd Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4659 ("This section would deem every employee benefit fund to be a trust held for the exclusive purpose of providing benefits to participants and their beneficiaries as well as defraying reasonable administrative expenses"); S. REP. NO. 127, 93rd Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4838, 4866 ("Fund assets are . . . deemed a trust and may only be used for the purposes of providing benefits for participants and defraying reasonable expenses"). It follows, then, that the MEBA plan is a spendthrift trust. See RESTATEMENT (SECOND) OF TRUSTS § 152(2) (1959) ("A trust in which by the terms of the trust or by statute a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed is a spendthrift trust"); A. SCOTT, THE LAW OF TRUSTS § 151, at 83 (4th ed. 1987) [hereinafter A. SCOTT] ("Trusts in which the interest of a beneficiary cannot be assigned by him or reached by his creditors have come to be known as spendthrift trusts"); see also *Goff v. Taylor (In re Goff)*, 706 F.2d 574, 589 (5th Cir. 1983) ("[W]ithout passing upon the exact limits of plans which could properly be characterized 'spendthrift trusts,' the employer-created-and-controlled nature of those plans may well make them analogous to a spendthrift trust"); *Chrysler-UAW Pension Plan v. Watkins (In re Watkins)*, 95 B.R. 483, 489 (W.D. Mich. 1988) ("[T]he Court concludes that the Pension Plan is enforceable under Michigan law as a spendthrift trust"); *In re Hysick*, 90 B.R. 770, 777 (Bankr. E.D. Pa. 1988) ("We conclude that this Plan would constitute a valid spendthrift trust under state law"); *In re Marriage of Parscal*, 148 Cal. App. 3d 1098, 1101-06, 196 Cal. Rptr. 462, 463-66 (1983) (ERISA plan containing spendthrift provi-



tract law this provision would render the assignment to Hermann Hospital invalid,<sup>119</sup> the district court on remand would have to de-

sion characterized by court as spendthrift trust).

Some ERISA plans have been characterized as "self-settled" trusts. *See, e.g.*, *Brooks v. Interfirst Bank (In re Brooks)*, 844 F.2d 258, 263-64 (5th Cir. 1988); *In re Weeks*, 106 B.R. 257, 261 (Bankr. E.D. Okla. 1989). This point is significant with respect to the question of the enforceability of a spendthrift provision in an ERISA welfare plan. *See infra* notes 120-76 and accompanying text (Section II.B.2.a. *Enforceability of an Anti-Assignment ("Spendthrift") Provision In an ERISA-Governed Employee Health Care Plan Against a Provider of Necessary Medical Services*). Under traditional trust law creditors of the settlor of a self-settled trust can reach the trust property even though the trust contains a spendthrift provision. *Brooks*, 844 F.2d at 261; *Citizens Nat'l Bank v. Taylor (In re Goff)*, 812 F.2d 931, 933 (5th Cir. 1987) ("The [self-settled] trust remains valid; only the spendthrift clause is void, allowing creditors to reach the property held in trust by garnishment.").

119. Based on the discussion that follows, it is submitted that as a matter of contract law the spendthrift provision in the MEBA plan would *not* invalidate Hermann Hospital's assignment.

The RESTATEMENT (SECOND) OF CONTRACTS § 322(2)(b) provides: "A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested, . . . gives the obligor a right to damages for breach of the terms forbidding assignment *but does not render the assignment ineffective* . . ." RESTATEMENT (SECOND) OF CONTRACTS § 322(2)(b) (1981) (emphasis added).

In *Cedar Point Apartments, Ltd. v. Cedar Point Inv. Corp.*, 693 F.2d 748 (8th Cir. 1982), *cert. denied*, 461 U.S. 914 (1983), the court stated:

Alternatively, even if the phrase "right to assign this Agreement" in paragraph 28 is construed to apply to an assignment of rights, no intent is thereby shown to eliminate the *power* to assign the contracts in violation of the restrictions. The Restatement (Second) of Contracts § 322(2)(b) (1981) states the general rule that "[a] contract term prohibiting assignment of rights under the contract, unless a different intention is manifested, . . . gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective. . . ." *Most significantly for purposes of this appeal, neither the form nor terminology of paragraph 28 purports to clearly bar the power to assign or to invalidate an assignment not made in compliance with the restrictions. Merely the "right to assign," not the power to assign, is limited by the express language of the clause. No intent is thereby revealed to avoid an assignment not meeting the restrictions.*

*Id.* at 754 (emphasis added in part) (footnote omitted).

The court dropped a footnote after making the above-quoted statement, saying:

One recognized commentator has pointed out that a contractual provision forbidding or restricting an assignment of rights under the contract may take any one of at least three distinct forms. . . . *Only one of these forms reveals the intent necessary to preclude the power to assign or to cause an assignment violative of contractual conditions to be wholly void. Such a clause must contain express provisions to the effect that any assignment shall be invalid if not made in a certain specified way.*

*Id.* at 754 n.4 (citations omitted) (emphasis added in part); *see also* *University Mews Assocs. v. Jeanmarie*, 122 Misc. 2d 434, 440, 471 N.Y.S.2d 457, 461 (Sup. Ct. 1983).

The spendthrift provision in the MEBA plan purports to take away only the *right* to assign; it neither takes away the *power* to assign nor contains language to the effect that any assignment made shall be void. Therefore, Patricia Nicholas had the *power* to assign, and the assignment is valid.

cide whether a spendthrift provision in an ERISA-governed employee health care plan is enforceable against a provider of necessary medical services. Based upon the discussion that follows, it is submitted that a spendthrift provision in an ERISA-governed employee health care plan is unenforceable against a provider of necessary medical services as a matter of law.

a. *Enforceability of an Anti-Assignment ("Spendthrift") Provision In an ERISA-Governed Employee Health Care Plan Against a Provider of Necessary Medical Services*

In *Massachusetts Mutual Life Insurance Co. v. Russell*,<sup>120</sup> Justice Brennan, in a concurring opinion joined by Justices White, Marshall and Blackmun, stated:

The legislative history [of ERISA] demonstrates that Con-

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Of course, the party asserting that the assignment is invalid would argue that common law contract principles are preempted by ERISA and that, therefore, such principles cannot be looked to for guidance in determining whether a spendthrift provision in an ERISA welfare plan operates to invalidate an assignment. This argument, however, would have no merit. In *Franchise Tax Bd.*, 463 U.S. 1 (1983), the Supreme Court stated that the issue of the "meaning and enforceability" of a spendthrift provision in an ERISA welfare benefit plan "comes within the class of questions for which Congress intended that federal courts create federal common law." *Id.* at 26 (footnote omitted). Because "[t]he development of federal common law may be informed by state law[.]" *HECI Exploration Co. Employees' Profit Sharing Plan v. Holloway (In re HECI Exploration Co.)* 862 F.2d 513, 523 (5th Cir. 1988) (footnote omitted), it follows that courts are free to look to common law contract principles for guidance in determining whether a spendthrift provision in an ERISA welfare plan operates to invalidate an assignment.

In *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140 (4th Cir. 1985), *summarily aff'd sub nom. Brooks v. Burlington Indus., Inc.*, 477 U.S. 901 (1986), the court stated:

"ERISA does not contain a body of contract law to govern the interpretation and enforcement of employee benefit plans. Instead, Congress intended for the courts, borrowing state law where appropriate, and guided by the policies expressed in ERISA and other federal labor laws, to fashion a body of federal common law to govern ERISA suits."

*Id.* at 1147 n.5 (quoting *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1501-02 (9th Cir. 1985)); *see also Kunin v. Benefit Trust Life Ins. Co.*, No. 88-6573 (9th Cir. Mar. 21, 1990) (WESTLAW, ALLFEDS Database, 1990 WL 28985) (construing ERISA welfare plan in accordance with state laws concerning construction of insurance contracts as a matter of federal common law); *Keel v. Group Hospitalization Medical Servs., Inc.*, 695 F. Supp. 223, 229 n.19 (E.D. Va. 1988) ("In this case, for example, the Court adopts, as part of that body of federal common law, settled principles of contract interpretation borrowed from state common law; specifically, contract terms, where unambiguous, should be given their plain meaning"); *Holiday v. Xerox Corp.*, 555 F. Supp. 51, 55 (E.D. Mich. 1982) ("[I]f the state law is preempted, then the contract must be construed in accordance with federal law, in this case the federal common law of contract. There is no substantial body of federal common law of contract. Thus, state law will be looked to as a guide."), *aff'd*, 732 F.2d 548 (6th Cir.), *cert. denied*, 469 U.S. 917 (1984).

120. 473 U.S. 134 (1985).

*gress intended federal courts to develop federal common law* . . . . In presenting the Conference Report to the full Senate, for example, Senator Javits, ranking minority member of the Senate Committee on Labor and Public Welfare and one of the two principal Senate sponsors of ERISA, stated that "[i]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." Senator Williams, the Committee's Chairman and the Act's other principal Senate sponsor, similarly emphasized that suits involving beneficiaries' rights "will be regarded as arising under the laws of the United States, in similar fashion to those brought under Section 301 of the Labor Management Relations Act." Section 301, of course, "authorizes federal courts to fashion a body of federal law" in the context of collective bargaining agreements, to be derived by "looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." . . . ERISA's legislative history also demonstrates that *Congress intended to engraft trust-law principles onto the enforcement scheme*, . . . and a fundamental concept of trust law is that courts "will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests." Thus ERISA was *not* so "carefully integrated" and "crafted" as to preclude further judicial delineation of appropriate rights and remedies; far from barring such a process, the statute explicitly directs that courts shall undertake it.<sup>121</sup>

Justice Brennan's statement establishes two important propositions: (1) that Congress intended for the federal courts to develop a federal common law of employee benefit plans,<sup>122</sup> and (2) that Con-

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121. *Id.* at 156-57 (Brennan, J., concurring) (emphasis added in part) (citations and footnotes omitted).

122. Support for this proposition is found in other case law as well. *See, e.g.,* Firestone Tire and Rubber Co. v. Bruch, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, 109 S. Ct. 948, 954 (1989) ("we have held that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans'" (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987))); *HECI Exploration Co.*, 862 F.2d 513, 523 nn. 18-19 (5th Cir. 1988); *Whitworth Bros. Storage Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 794 F.2d 221, 235-36 (6th Cir.), *cert. denied*, 479 U.S. 1007 (1986). *See generally* Ray & Halpern, *The Common Law of ERISA: Federal Courts as Lawmakers*, 21 TRIAL 20 (June 1985).

In *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496 (9th Cir. 1984), the Ninth Circuit commented on the function of the federal common law of ERISA stating:

But Congress realized that the bare terms, however detailed, of these [ERISA's] statutory provisions would not be sufficient to establish a comprehensive regulatory scheme. It accordingly empowered the courts to develop, in light of reason and experience, a body of federal common law governing employee benefit plans. The federal common law serves three related ends. First, it sup-

gress intended for the law of trusts to apply, at least in some respects, to employee benefit plans.<sup>123</sup>

In *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*,<sup>124</sup> the United States Supreme Court stated that the issue of the "meaning and enforceability"<sup>125</sup> of a spendthrift provision in an ERISA-governed employee welfare benefit plan "comes within the class of questions for which Congress intended that federal courts create federal common law."<sup>126</sup> Therefore, federal courts are authorized—indeed,

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plements the statutory scheme interstitially. . . . Second and more generally, it serves to ramify and develop the standards that the statute sets out in only general terms. . . . Third, Congress viewed ERISA as a grant of authority to the courts to develop principles governing areas of the law regulating employee benefit plans that had previously been the exclusive province of state law.

*Id.* at 1499 (citation omitted).

Congress, in response to the Supreme Court's decision in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987), reaffirmed the authority of federal courts to develop federal common law, stating:

The Committee reaffirms the authority of the Federal courts to shape legal and equitable remedies to fit the facts and circumstances of the cases before them, even though those remedies may not be specifically mentioned in ERISA itself. In cases in which, for instance, facts and circumstances show that the processing of legitimate benefit claims has been unreasonably delayed or totally disregarded by an insurer, an employer, a plan administrator, or a plan, the Committee intends the Federal courts to develop a Federal common law of remedies, including (but certainly not limited to) the imposition of punitive damages on the person responsible for the failure to pay claims in a timely manner.

H.R. REP. NO. 801, 100th Cong., 2d Sess., pt. 2, at 63 (1988).

Federal question jurisdiction can be premised upon federal common law claims. *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) ("[Section] 1331 jurisdiction will support claims founded upon federal common law"); *Northeast Dep't ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 156 (3d Cir. 1985) ("[T]he rule enunciated in *Illinois v. Milwaukee* should be applicable in ERISA related actions." (footnote omitted)).

123. See *Firestone*, — U.S. at —, 109 S. Ct. at 954 ("ERISA abounds with the language and terminology of trust law. . . . ERISA's legislative history confirms that the Act's fiduciary responsibility provisions . . . 'codif[y] and make applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts'" (quoting legislative history of ERISA)); see also *Massachusetts Mut. Life*, 473 U.S. at 152-53 (1985) (Brennan, J., concurring) ("Congress intended by § 404(a) [29 U.S.C. § 1104(a)] to incorporate the fiduciary standards of trust law into ERISA," *id.* at 152 (footnote omitted), and "Congress [also] intended these fiduciary standards to govern the ERISA claims-administration process[.]" *id.* at 153 (footnote omitted)); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc.*, 793 F.2d 1456, 1463 (5th Cir. 1986) ("The various committee reports indicate that Congress intended to import into ERISA the fiduciary principles of the law of trusts, adapted as necessary for employee benefit plans"), *cert. denied*, 479 U.S. 1034 & 1089 (1987).

124. 463 U.S. 1 (1983).

125. *Id.* at 26.

126. *Id.* (footnote omitted).

are bound—to create federal common law on the issue of the meaning and enforceability of a spendthrift provision in an ERISA-governed employee health care plan. Because “[t]he development of federal common law may be informed by state law[,]”<sup>127</sup> and/or because “Congress intended to engraft trust-law principles onto the enforcement scheme,”<sup>128</sup> courts logically should look to the law of trusts for guidance in developing the federal common law on the issue of the meaning and enforceability of a spendthrift provision in an ERISA-governed employee health care plan. It is a fundamental principle of trust law that a spendthrift provision is unenforceable against a provider of necessities.<sup>129</sup> Professor Griswold, in his book *Spendthrift Trusts*, states:

A physician who renders necessary medical services to the beneficiary of a spendthrift trust may enforce his claim for payment for these services against the trust estate. This should be true whether the services were rendered with the knowledge of the trustees or not. The physician who renders necessary services should not be relegated to the status of an ordinary creditor and denied recovery . . . .<sup>130</sup>

Professor Scott states that “[w]here the claim is one for furnishing necessities to the beneficiary, . . . to permit the enforcement of a claim against the trust estate tends not to defeat but to promote the

127. *HECI Exploration Co. Employees' Profit Sharing Plan v. Holloway* (*In re HECI Exploration Co.*), 862 F.2d 513, 523 (5th Cir. 1988) (footnote omitted).

128. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 156-57 (1985) (Brennan, J. concurring).

129. Section 157(b) of the RESTATEMENT (SECOND) OF TRUSTS provides: “Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary . . . (b) *for necessary services rendered to the beneficiary or necessary supplies furnished him . . .*” RESTATEMENT (SECOND) OF TRUSTS § 157(b) (1959) (emphasis added).

The “Comment on Clause (b)” observes that “[i]f such a claim were not enforced, it would tend to prevent the beneficiary from obtaining necessary assistance, and a refusal to enforce such a claim is not necessary for the protection of the beneficiary’s interest under the trust.” *Id.* § 157 comment on clause (b).

Illustration 3 provides: “A bequeaths \$100,000 to B upon a spendthrift trust for C. C is suddenly taken ill and D, a physician who is present at the time, renders medical services. D can reach C’s interest under the trust in payment for the services.” *Id.* § 157 comment on clause (b), illustration 3.

Comment “g” provides: “Not only may the claimants enumerated in this Section [157] reach the interest of the beneficiary by judicial proceedings to satisfy their claims, but a *voluntary conveyance by the beneficiary of his interest so far as necessary to satisfy such claims is valid.*” *Id.* § 157 comment g (emphasis added).

130. E. GRISWOLD, *SPENDTHRIFT TRUSTS* § 347, at 411 (2d ed. 1947) (footnote omitted).

purpose of the settlor.”<sup>131</sup> Professor Scott further observes that “[i]t has been held that a physician who has rendered necessary medical services to the beneficiary, or a hospital that has rendered such services, is entitled to compensation out of the trust estate, although the trust was a spendthrift trust or a trust for support.”<sup>132</sup>

The above discussion strongly supports the proposition that a spendthrift provision in an ERISA-governed employee health care plan is unenforceable against a provider of necessary medical services as a matter of law. For the courts to hold otherwise would be contrary to public policy and to the purposes and policies of ERISA because health care providers would then be unprotected under both state and federal law<sup>133</sup> and would have to refuse to treat any individual covered by an ERISA-governed employee health care plan containing a spendthrift provision who seeks treatment intending that payment be made through the plan and who is unable to pay for services through sources other than the plan.<sup>134</sup> It would obvi-

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131. A. SCOTT, *supra* note 118, § 157.2, at 202.

As the Ninth Circuit noted in *Misic*, “[h]ealth and welfare benefit trust funds are designed to finance health care. Assignment of trust monies to health care providers results in precisely the benefit the trust is designed to provide and the statute is designed to protect.” *Misic v. Building Serv. Employees Health and Welfare Trust*, 789 F.2d 1374, 1377 (9th Cir. 1986); *see also* *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1289 (5th Cir. 1988) (“An assignment to a health care provider facilitates rather than hampers the employee’s receipt of health benefits” (footnote omitted)).

132. A. SCOTT, *supra* note 118, § 157.2, at 202 (footnote omitted).

133. As it stands, health care providers are unprotected under state law because ERISA has been construed as preempting the state law claims of health care providers as against ERISA-governed employee health care plans. *See* cases cited at *supra* note 24. Of course, the health care provider could sue the patient individually, *see Hermann Hosp.*, 845 F.2d at 1289 n.13 (“If their status as assignees does not entitle them to federal standing against the plan, . . . they would have to sue the beneficiary”), and get a money judgment against him, and then garnish the plan under state garnishment law if state garnishment law permits garnishment of fringe benefits. *See infra* notes 199-228 and accompanying text (Section III. GARNISHMENT OF EMPLOYEE WELFARE BENEFITS). This, however, constitutes minimal, inadequate and uncertain protection at best. In states where garnishment of fringe benefits is not permitted, it would constitute no protection.

If spendthrift provisions in ERISA-governed employee health care plans were held to be enforceable against health care providers, health care providers would also be unprotected under federal law because they would have no derivative standing to sue under ERISA. Of course, the health care provider could try to establish that it has standing to sue *in its own right* under the theory that it qualifies as a beneficiary as defined in section 1002(8) of ERISA. If it could establish this, it would be protected under federal law to that extent. As discussed at *supra* notes 41-94 and accompanying text (Section II.A. *Persons Expressly Empowered by Section 1132(a) of ERISA to Sue*), however, the law on this issue is unsettled.

134. *See supra* text accompanying note 115; *see also* RESTATEMENT (SECOND) OF TRUSTS § 157, comment on clause (b) (1959) (“If such a claim were not enforced, it would tend to prevent the beneficiary from obtaining necessary assistance”); *Misic*, 789 F.2d at 1377 (if assignments were not permitted it would be necessary “for health care providers to evaluate

ously be contrary to public policy to place participants and beneficiaries in ERISA-governed employee health care plans containing a spendthrift provision in a situation of being unable to obtain health care.<sup>135</sup> Moreover, it would "undermine Congress' goal of enhancing employees' health . . . benefit coverage"<sup>136</sup> and frustrate ERISA's policy of ensuring "the continued well-being and security of millions of employees and their dependents."<sup>137</sup> Further, it would contravene ERISA's policy of fostering the successful development of employer-employee relations.<sup>138</sup> The successful development of employer-employee relations obviously would not be fostered if plan participants and beneficiaries were unable to obtain the health care that their employee health care plan was designed to enable them to finance merely because the plan contains a spendthrift provision that does not contain an exception for health care providers. Further, in the unlikely event that a health care provider, for whatever reason, were willing to treat an individual covered by an ERISA-governed employee health care plan containing an enforceable spendthrift provision in exchange for an assignment of benefits, the trustees' refusal to honor the assignment would result in the individual being sued in his or her individual capacity by the health care provider.<sup>139</sup> The successful development of employer-employee relations would not be fostered if employees and their beneficiaries were constantly subjected to lawsuits by health care providers merely because their employee health care plan contains a spendthrift provision that does not

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the solvency of patients before commencing medical treatment").

135. "Spendthrift trusts are not enforceable . . . when the enforcement would be contrary to public policy." *In re Hysick*, 90 B.R. 770, 774 (Bankr. E.D. Pa. 1988). See generally G. BOGERT & G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 224 (Rev. 2d ed. 1979).

136. *Hermann Hosp.*, 845 F.2d at 1289 n.13; see also *Kennedy v. Deere & Co.*, 118 Ill. 2d 69, 74, 514 N.E.2d 171, 173 (1987) (referring to "the intent of Congress in providing under ERISA for health . . . benefit plans"), *aff'g* 142 Ill. App. 3d 781, 492 N.E.2d 199 (1986), *cert. denied*, 484 U.S. 1064 (1988).

137. 29 U.S.C. § 1001(a) (1982).

138. In enacting ERISA, Congress intended to protect employer-employee relations. *Fentron Indus., Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1305 (9th Cir. 1982); see also 29 U.S.C. § 1001(a) (1982) (employee benefit plans "have become an important factor affecting the stability of employment and the successful development of industrial relations" (emphasis added)); cf. *Adam v. Joy Mfg. Co.*, 651 F. Supp. 1301, 1306 (D. N.H. 1987) ("ERISA was also crafted to protect the interests of employers" (emphasis in original)); H.R. REP. NO. 533, 93rd Cong., 2d Sess., reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 4639, 4647 (Congress passed ERISA, in part, to "strike an appropriate balance between the interests of employers . . . and the need of the workers for a level of protection which will adequately protect their rights" (emphasis added)).

139. See *Hermann Hosp.*, 845 F.2d at 1289 n.13 ("If their status as assignees does not entitle them to federal standing against the plan, providers would . . . have to sue the beneficiary").

contain an exception for health care providers.

Not only would it be contrary to public policy and to the purposes and policies of ERISA for the courts to hold that a spendthrift provision in an ERISA-governed employee health care plan is enforceable against a provider of necessary medical services, but it would also be directly contrary to ERISA's provisions. As the Fifth Circuit stated in *Hermann Hospital*:

ERISA contains no anti-assignment provision with regard to health care benefits of ERISA-governed medical plans, nor is there any language in the statute which even remotely suggests that such assignments are proscribed or ought in any way to be limited. As *Misic* notes, the existence of an elaborate and complex statutory anti-assignment clause for ERISA pension benefits makes significant the complete absence of any anti-assignment clause applicable to ERISA health benefits, . . . especially in light of the Supreme Court's recognition of ERISA as "comprehensive and reticulated." . . . Moreover, the purpose of ERISA's proscription on assignment of pension benefits, "[t]o further insure that the employees' accrued benefits are actually available for retirement purposes," would not be served by applying it to health care benefits. An assignment to a health care provider facilitates rather than hampers the employees' receipt of health benefits. . . . *These factors comprise sufficient evidence of Congress' intention to allow the assignment of health benefits.*<sup>140</sup>

The Fifth Circuit's statement makes clear that ERISA, by its own terms, does not prohibit the assignment of health care benefits. Thus, for the courts to hold that a spendthrift provision in an ERISA-governed employee health care plan is enforceable against a provider of necessary medical services would be directly contrary to ERISA's provisions.

A further reason why a spendthrift provision in an ERISA-governed employee health care plan should be held by the courts to be unenforceable against a provider of necessary medical services as a matter of law is because for the trustees of the plan to include within the plan a provision that has the potential of forcing health care providers to refuse treatment to plan participants and beneficiaries constitutes arbitrary, capricious and unreasonable conduct<sup>141</sup> and

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140. *Id.* at 1289-90 (emphasis added) (citations and footnotes omitted).

141. Indeed, the universal employee health care plan "allows the assignment of health insurance benefits to people who are not covered directly by a plan." *Oversight Hearing*, *supra* note 12, at 53 (statement of Deborah J. Chollet, Ph.D., Research Associate, Employee



thus constitutes a breach of the fiduciary duties owed by the trustees to the plan participants and beneficiaries.<sup>142</sup> This rationale was applied by the Third Circuit in *Northeast Department ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*,<sup>143</sup> in holding an "escape" clause unenforceable as a matter of law. The court stated:

[O]ne very important policy underlying ERISA is that employees enrolled in a benefit plan should not be deprived of compensation that they reasonably anticipate under the plan's purported coverage. Escape clauses, however, risk just such a result. . . . In our view, trustees who incorporate in a plan a provision that has the potential to harm participants in this way have indeed acted in an arbitrary and capricious manner.

Accordingly, we hold that the escape clauses in ERISA covered employee benefit plans are unenforceable as a matter of law.<sup>144</sup>

Likewise, the harm that would result if spendthrift provisions in ERISA-governed employee health care plans were enforced against health care providers militates in favor of the conclusion that for the trustees of an ERISA-governed employee health care plan to include within the plan a spendthrift provision that does not contain an exception for health care providers constitutes arbitrary, capricious and unreasonable conduct and thus constitutes a breach of the fiduciary duties owed by the trustees to the plan participants and beneficiaries.

No policy of ERISA would be served by prohibiting the assignment of health care benefits to health care providers. The plan might argue that to prohibit the assignment of health care benefits to a

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Benefit Research Institute, Washington, D.C.) (emphasis added).

142. ERISA imposes fiduciary duties upon plan trustees. Specifically, section 1104 of ERISA requires trustees to "discharge . . . [their] duties with respect to a plan solely in the interest of the participants and beneficiaries," 29 U.S.C. § 1104(a)(1) (1982), and "for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . ." *Id.* § 1104(a)(1)(A)(i). In *National Labor Relations Bd. v. Amax Coal Co.*, 453 U.S. 322 (1981), the Supreme Court stated:

Under principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of all other parties. . . . To deter the trustee from all temptation and to prevent any possible injury to the beneficiary, the rule against a trustee dividing his loyalties must be enforced with "uncompromising rigidity."

*Id.* at 329-30 (citations omitted) (quoting *Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928)).

143. 764 F.2d 147 (3d Cir. 1985).

144. *Id.* at 163-64 (footnotes omitted).

health care provider protects the financial integrity of the plan. This argument, however, would be meritless. To begin with, the financial integrity of the plan is meaningless unless health care is available. Moreover, to allow health care providers, as assignees of plan participants and beneficiaries, to sue under ERISA would have absolutely no effect on the financial integrity of the plan because "an assignee takes only the interest of its assignor."<sup>145</sup> Therefore, the plan would not be subjected to any greater liability than if the patient himself were seeking to enforce his own rights. If the health care provider were successful on the merits, the plan would simply be paying the health care provider the same amount it would otherwise be paying the patient.

The plan might also argue that under ERISA it is the participant or beneficiary who is entitled to receive benefits due under the plan and that, therefore, to prohibit the assignment of benefits to a health care provider furthers the policies of ERISA.<sup>146</sup> This argument would also be meritless. The participant or beneficiary to whom services have been rendered has no legitimate expectation of keeping the benefits that he or she receives from the plan pursuant to a claim.<sup>147</sup> He or she fully expects to pay the benefits to the health care provider. Therefore, if the health care provider were to receive the benefits directly by virtue of an action for benefits against the plan, the expectations of the participant or beneficiary would not be affected. Indeed, the expectations of the participant or beneficiary would be met because by assigning his or her benefits to the health care provider the participant or beneficiary evidences his or her intent and desire that the benefits be paid directly to the health care provider. Moreover, where a health care provider has rendered ser-

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145. *United States v. Three Hundred Sixty Four Thousand Nine Hundred Sixty Dollars* (\$364,960.00) *In United States Currency*, 661 F.2d 319, 326 (5th Cir. 1981); *see also Wisconsin Dep't of Health & Social Servs. v. Upholsterers Int'l Union Health and Welfare Fund*, 686 F. Supp. 708, 712 (W.D. Wis. 1988) ("By assigning to plaintiff their right to benefits under defendant's plan, the members . . . have assigned any potential claim they might have under the plan, nothing more and nothing less").

146. In *Hermann Hosp.*, 845 F.2d 1286 (5th Cir. 1988), for example, the plan argued in its brief on appeal that "[t]here is no question that, under ERISA, it is the *employee* who is entitled to receive benefits from a welfare plan . . . ERISA created no duty whatsoever on the part of plans toward service providers." Brief of Defendant-Appellee at 20-21 (emphasis in original), *Hermann Hosp.*, 845 F.2d 1286. Ironically, as noted by the hospital in its reply brief, the plan had not paid Mr. Robert Nicholas—the employee-participant under the MEBA plan and the surviving spouse of Patricia Nicholas, the woman to whom the hospital rendered services—nor the estate of Patricia Nicholas, any benefits. Reply Brief for Plaintiff-Appellant at 7, *Hermann Hosp.*, 845 F.2d 1286.

147. This assumes, of course, that the participant or beneficiary has not previously paid the provider's bill out of his or her own pocket.

vices to a participant or beneficiary it is the health care provider, not the participant or beneficiary, that needs to be made whole.<sup>148</sup> The participant or beneficiary has already been made "whole" by virtue of the fact that he or she has obtained medical services.

In summary, spendthrift provisions in ERISA-governed employee health care plans should be held unenforceable against health care providers as a matter of law under the principle of trust law which holds that a spendthrift provision is unenforceable against a provider of necessities. To hold otherwise would be contrary to public policy and to the provisions and policies of ERISA.

### i. Case Law

Two cases directly address the issue of the enforceability of a spendthrift provision in an ERISA-governed employee welfare benefit plan.<sup>149</sup> In each case the spendthrift provision was held to be un-

148. Again, this assumes that the provider's bill has not already been paid by the participant or beneficiary out of his or her own pocket.

149. Although only two cases have been found addressing the issue of the enforceability of a spendthrift provision in an ERISA *welfare* benefit plan, many cases have addressed the issue of the enforceability of a spendthrift provision in an ERISA *pension* plan. ERISA's anti-assignment/anti-alienation provision, 29 U.S.C. § 1056(d)(1) (1982), mandates that all pension plans contain a spendthrift provision. This provision does *not* apply to welfare plans. See *supra* note 108 (quotation from the Supreme Court's opinion in *Mackey*), *supra* notes 102-05 and accompanying text, and *supra* text accompanying note 140. The provision is designed to ensure that an employee's pension will be available upon retirement. *Hermann Hosp.*, 845 F.2d at 1289 ("the purpose of ERISA's proscription on assignment of pension benefits [is] . . . '[t]o further insure that the employees' accrued benefits are actually available for retirement purposes'" (quoting legislative history of ERISA) (footnote omitted)); *Misic v. Building Serv. Employees Health and Welfare Trust*, 789 F.2d 1374, 1377 (9th Cir. 1986) ("[T]he pension anti-assignment provision serves the general goal of ERISA: 'to assure that individuals who have spent their careers in useful and socially productive work will have adequate incomes to meet their needs when they retire.'" (quoting legislative history of ERISA)).

Courts have found numerous implied exceptions to ERISA's pension anti-assignment/anti-alienation provision. In the following cases, for example, an implied exception was found because of the misconduct, fraud or wrongdoing of the individual seeking to invoke the provision: *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 856 F.2d 1457, 1459-61 (10th Cir. 1988) (pension benefits of union official who embezzled money from the union or pension fund placed in constructive trust), *cert. granted*, \_\_\_ U.S. \_\_\_, 109 S. Ct. 3212 (1989); *Crawford v. La Boucherie Bernard, Ltd.*, 815 F.2d 117, 121 (D.C. Cir.) (pension benefits of trustee who embezzled money from plan offset and applied to judgment obtained against him by plan participants), *cert. denied sub nom.* *Goldstein v. Crawford*, 484 U.S. 943 (1987); *St. Paul Fire and Marine Ins. v. Cox*, 752 F.2d 550, 551-52 (11th Cir. 1985) (pension benefits of bank employee who was convicted of misapplying bank funds garnished to satisfy judgment against him); *Calhoun v. FDIC*, 653 F. Supp. 1288, 1293-94 (N.D. Tex. 1987) (following *St. Paul*). But see *McLaughlin v. Lindemann*, 853 F.2d 1307, 1310 (5th Cir. 1988) (district court which allowed equitable offset remedy against a nonfiduciary who was jointly and severally liable for knowingly participating in a fiduciary's breach "should have followed the lead of those courts which hold that additional exceptions to ERISA's vesting and inalienability provisions should

enforceable. The first case to address the issue was *Electrical Work-*

be created by Congress, not the courts"); *United Metal Prods. Corp. v. National Bank of Detroit*, 811 F.2d 297, 299-301 (6th Cir. 1987) (refusing to allow employer to garnish employee's pension benefits to satisfy judgment against employee arising from employee's embezzlement of money belonging to employer), *cert. dismissed*, 485 U.S. 1017 (1988); *Ellis Nat'l Bank of Jacksonville v. Irving Trust*, 786 F.2d 466, 469-72 (2d Cir. 1986) (refusing to recognize theft or fraud exception to ERISA's pension anti-assignment/anti-alienation provision); *Vink v. SHV N. Am. Holding Corp.*, 549 F. Supp. 268, 269-73 (S.D.N.Y. 1982) (refusing to recognize fraud exception). See generally Note, *Employee Theft and ERISA: A Proposed Amendment to Garnish Pension Benefits*, 10 CARDOZO L. REV. 315 (1988); Note, *ERISA—Exceptions to the Anti-Alienation Provision: Strengthening ERISA's Protection Through a Fraud Amendment*, 10 W. NEW ENG. L. REV. 317 (1988).

The Fifth Circuit recently held that "a controversy between good-faith adverse claimants to pension plan benefits is subject to settlement like any other, and that an assignment made pursuant to a bona fide settlement of such a controversy is not invalidated by the anti-alienation provision of ERISA, 29 U.S.C. § 1056(d)(1), or by that of the Internal Revenue Code, 26 U.S.C. § 401(a)(13)." *Stobnicki v. Textron, Inc.*, 868 F.2d 1460, 1465 (5th Cir. 1989). In interpreting ERISA's anti-assignment/anti-alienation provision the court stated:

Although the general purpose of the anti-alienation provision is clear, Congress often fails to note that broad, sweeping prohibitions in the law rarely work justice, and often work to frustrate the purpose for which a law was originally enacted. We will not ascribe to Congress the intent of making an unreasonable law—one requiring terminal litigation, rather than favoring settlements as does the general law. When a law so vaguely worded leads to an absurd result, courts look carefully to see if that result could have been anticipated. If so, we must carry it out; if not we must try somehow to make sense of the enactment. While we agree with Francis Bacon that judges should interpret and not make law, we are also mindful that he imposed an obligation on judges to use and apply the law wisely.

*Id.* at 1462-63.

The court reasoned that to strictly construe ERISA's anti-assignment/anti-alienation provision as prohibiting claimants to pension benefits from settling their dispute would be contrary to the purposes and policies of ERISA because the prevailing party in litigation would win "little more than a Pyrrhic victory" due to the fact that attorney fees would have to be paid from the pension benefits recovered, leaving the winner with little or nothing to live on. *Id.* at 1464. The court concluded:

Little comfort indeed . . . is to be found in litigating away pension plan benefits to satisfy the blind edicts of an anti-alienation provision that creates unjust and unanticipated consequences, frustrating the purpose of the law. Like other courts which have faced it, we therefore conclude that the apparent statutory bar against alienation of pension benefits must once again yield to reason and to the purposes for which the Act was written.

*Id.*

In the following cases, the court found an implied exception to ERISA's pension anti-assignment/anti-alienation provision because child support, alimony or community property was involved: *Savings and Profit Sharing Fund of Sears Employees v. Gago*, 717 F.2d 1038, 1041-43 (7th Cir. 1983) (property division); *Bowen v. Bowen*, 715 F.2d 559, 560 (11th Cir. 1983) (alimony); *Operating Eng'rs' Local No. 428 Pension Trust Fund v. Zamborsky*, 650 F.2d 196, 200-01 (9th Cir. 1981) (alimony); *Cody v. Riecker*, 594 F.2d 314, 315 (2d Cir. 1979) (spouse and child support); *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118, 121 (2d Cir. 1979) (alimony and child support), *cited with approval in Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983); *Employees Sav. Plan of Mobile Oil Corp. v. Geer*, 535 F. Supp. 1052, 1057 (S.D.N.Y. 1982) (community property); *Ball v. Revised Retirement Plan for*

ers, *Local No. 1 Credit Union v. IBEW-NECA Holiday Trust Fund*.<sup>150</sup> In *Electrical Workers*, a creditor of an individual covered by an ERISA-governed employee welfare benefit plan obtained a judgment against the individual.<sup>151</sup> The creditor thereafter sought to enforce the judgment by garnishing benefits due the individual under the plan.<sup>152</sup> The creditor based its right to garnish on the Missouri wage garnishment statute. The plan responded by asserting, among other things, that a spendthrift provision in the plan instrument prohibited the creditor from garnishing the individual's benefits.<sup>153</sup> In deciding the case, the Missouri Supreme Court engaged in a three-part inquiry: (1) does ERISA's anti-assignment/anti-alienation pro-

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Salaried Employees of Johns-Mansville Corp. and Subsidiaries, 522 F. Supp. 718, 720 (D. Colo. 1981) (spousal support); *Central States v. Parr*, 480 F. Supp. 924, 925 (E.D. Mich. 1979) (alimony); *Senco, Inc. v. Clark*, 473 F. Supp. 902, 908 (M.D. Fla. 1979) (alimony and child support); *Carpenters Pension Trust v. Kronschnabel*, 460 F. Supp. 978, 982 (C.D. Cal. 1978) (community property), *aff'd*, 632 F.2d 745 (1980), *cert. denied*, 453 U.S. 922 (1981); *Cartledge v. Miller*, 457 F. Supp. 1146, 1153-58 (S.D.N.Y. 1978) (spouse and child support); *Stone v. Stone*, 450 F. Supp. 919, 924-31 (N.D. Cal. 1978) (community property), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied sub nom. Seafarers Int'l Union, Pac. Dist.-Pac. Maritime Ass'n Pension Plan v. Stone*, 453 U.S. 922 (1981); *In re Marriage of Williams*, 163 Cal. App. 3d 753, 760-66, 209 Cal. Rptr. 827, 831-35 (1985) (spousal support); *In re Marriage of Campa*, 89 Cal. App. 3d 113, 125-26, 152 Cal. Rptr. 362, 368-69 (1979) (property division), *appeal dismissed sub nom. Carpenters Pension Trust Fund v. Campa*, 444 U.S. 1028 (1980); *Knapp v. Johnson*, 301 N.W.2d 548, 549 (Minn. 1980) (child support); *Hopkins v. Hopkins*, 626 S.W.2d 389, 393 (Mo. Ct. App. 1981) (spousal support); *Western Elec. Co. v. Traphagen*, 166 N.J. Super. 418, 426-30, 400 A.2d 66, 69-71 (N.J. Super. Ct. App. Div. 1979) (alimony); *Biles v. Biles*, 163 N.J. Super. 49, 52-57, 394 A.2d 153, 155-57 (N.J. Super. Ct. Ch. Div. 1978) (alimony); *Pepitone v. Pepitone*, 108 Misc. 2d 12, 13-14, 436 N.Y.S.2d 966, 968 (Sup. Ct. 1981) (alimony and child support); *In re M.H. v. J.H.*, 93 Misc. 2d 1016, 1020-22, 403 N.Y.S.2d 411, 414-16 (Fam. Ct. 1978) (child support); *Wanamaker v. Wanamaker*, 93 Misc. 2d 784, 786-89, 401 N.Y.S.2d 702, 703-06 (Fam. Ct. 1978) (alimony). See generally Note, *Garnishment of ERISA Benefits to Satisfy Family Support Obligations: Achieving Equity Through Judicial Legislation*, 46 BROOKLYN L. REV. 961 (1980).

The family support exception to ERISA's pension anti-assignment/anti-alienation provision has been codified by Congress. *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 856 F.2d 1457, 1459 n.2 (10th Cir. 1988) (citing 29 U.S.C. § 1056(d)(3) (Supp. V 1987)), *cert. granted*, \_\_\_\_ U.S. \_\_\_\_, 109 S. Ct. 3212 (1989). For a more detailed discussion of the family support exception, as codified, see *Arizona Laborers, Teamsters, and Cement Masons, Local 395 Pension Trust Fund v. Nevarez*, 661 F. Supp. 365, 367-68 (D. Ariz. 1987).

For general commentary on ERISA's pension anti-assignment/anti-alienation provision, see Kirschbaum, *ERISA Spendthrift Rules—It Just Shouldn't Be This Hard*, 11 CAMPBELL L. REV. 29 (1988); Sherman, *Spendthrift Trusts and Employee Pensions: The Problem of Creditors' Rights*, 55 IND. L.J. 247 (1980).

150. 583 S.W.2d 154 (Mo. 1979) (en banc). For student commentary on this case, see Recent Case, 45 MO. L. REV. 369 (1980).

151. *Electrical Workers*, 583 S.W.2d at 156.

152. *Id.* at 157.

153. *Id.*

vision, section 1056(d)(1),<sup>154</sup> prohibit the garnishment of welfare benefits? (2) if not, does ERISA's preemption provision, section 1144(a),<sup>155</sup> preempt the Missouri wage garnishment statute? and (3) if not, does the spendthrift provision in the plan instrument prohibit the creditor from garnishing benefits due the individual? Regarding the first inquiry, the court correctly noted that ERISA's anti-assignment/anti-alienation provision, section 1056(d)(1), applies only to pension plans and therefore has no effect on welfare plans.<sup>156</sup> The court next proceeded to determine whether ERISA's preemption provision, section 1144(a), preempts Missouri's wage garnishment statute. Relying on an Oregon Appellate Court decision, the court declined to hold that section 1144(a) preempts Missouri's wage garnishment statute, stating:

The enforcement of state court money judgments by creditors is a valid area of state concern, and is one which is totally unregulated by ERISA with respect to welfare plans. We decline to interpret [section 1144(a) of] ERISA to require preemption of Missouri laws in this area, "in the absence of any legislative declaration that Congress intended to create an enormous regulatory vacuum in areas that traditionally have been matters of vital state concern."<sup>157</sup>

Finally, the Missouri Supreme Court turned to the issue of whether the spendthrift provision in the plan prohibited the creditor from garnishing benefits due the individual under the plan.<sup>158</sup> As a preliminary matter, the court first reasoned that the individual's vacation benefits were "wages or earnings" within the meaning of the Missouri wage garnishment statute and were therefore subject to garnishment.<sup>159</sup> The only issue remaining was whether the benefits were nevertheless protected from garnishment by virtue of the spend-

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154. 29 U.S.C. § 1056(d)(1) (1982). For the text of section 1056(d)(1), see *supra* text accompanying note 102.

155. 29 U.S.C. § 1144(a) (1982). See *supra* note 10 for a discussion of section 1144(a).

156. *Electrical Workers*, 583 S.W.2d at 157-58 n.2.

157. *Id.* at 159 (quoting *Gast v. Oregon*, 36 Or. App. 441, 458, 585 P.2d 12, 23 (1978)).

The United States Supreme Court recently reached the same conclusion as the *Electrical Workers* court in *Mackey v. Lanier Collections Agency & Serv., Inc.*, 486 U.S. 825, 830-34 (1988) (ERISA does not preempt Georgia's general garnishment statute insofar as the statute concerns ERISA welfare plans). The Court cited *Electrical Workers*, among other cases, as support for its conclusion. *Id.* at 832 n.6. For a thorough discussion of *Mackey*, see *infra* notes 199-228 and accompanying text (Section III. GARNISHMENT OF EMPLOYEE WELFARE BENEFITS).

158. *Electrical Workers*, 583 S.W.2d at 159-62.

159. *Id.* at 159-61.

thrift provision in the plan.<sup>160</sup> The court held that the spendthrift provision was contrary to public policy and therefore invalid and unenforceable because it prohibited that which the Missouri wage garnishment statute permitted.<sup>161</sup>

The only other case found that directly addresses the issue of the enforceability of a spendthrift provision in an ERISA-governed employee welfare benefit plan is *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*.<sup>162</sup> In *Franchise Tax Board*, three beneficiaries of an ERISA-governed employee vacation benefit plan containing a spendthrift provision owed taxes to the state of California.<sup>163</sup> The Franchise Tax Board, pursuant to section 18817 of the California Revenue and Taxation Code, issued to the plan notices to withhold benefits due the beneficiaries under the plan.<sup>164</sup> The plan, after obtaining an opinion letter from the Administrator for Pension and Welfare Benefit Programs, notified the Tax Board that it would not honor the Board's levies.<sup>165</sup> The Board thereafter filed suit against the plan seeking damages in the amount of the taxes owed by the three plan beneficiaries "and a declaration that [the plan] was obligated to honor all future levies by the Board."<sup>166</sup> In deciding whether the plan was obligated to honor the Board's levies, the California Court of Appeals engaged in a three-part inquiry similar to the three-part inquiry engaged in by the *Electrical Workers* court: (1) does ERISA's anti-assignment/anti-alienation provision, section 1056(d)(1),<sup>167</sup> prohibit the Tax Board from levying upon benefits due under an ERISA-governed employee welfare plan? (2) if not, does ERISA's preemption provision, section 1144(a),<sup>168</sup> preempt sections 18817 and 18818 of the California Revenue and Tax Code,

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160. *Id.* at 162.

161. *Id.* The court stated:

Respondent contends that § 525.030 RSMo 1975 Supp., authorizes the garnishment of wages and earnings and that a spendthrift provision which purports to prevent such garnishment is contrary to that statute and is thereby contrary to public policy. We agree. Section 525.030 sets the maximum amount of a judgment debtor's wages which may be garnished. Extending greater protection then [sic] that afforded by the statute to some wage earners, but not to others, would violate the intent of that statute.

*Id.*

162. 204 Cal. App. 3d 955, 251 Cal. Rptr. 597 (1988).

163. *Id.* at 959, 251 Cal. Rptr. at 598.

164. *Id.*

165. *Id.*

166. *Id.* at 959, 251 Cal. Rptr. at 599.

167. 29 U.S.C. § 1056(d)(1) (1982).

168. *Id.* § 1144(a).

and (3) if not, does the spendthrift provision in the plan instrument prohibit the Tax Board from levying upon benefits due under the plan? Regarding the first inquiry, the court noted that ERISA's anti-assignment/anti-alienation provision, section 1056(d)(1), applies only to pension plans and therefore has no effect on welfare plans.<sup>169</sup> The court then considered the effect of ERISA's preemption provision, section 1144(a), on sections 18817 and 18818 of the California Revenue and Tax Code. The court likened sections 18817 and 18818 to ordinary state garnishment laws and therefore held that under the United States Supreme Court's recent decision in *Mackey v. Lanier Collections Agency & Service, Inc.*<sup>170</sup> they were not preempted by ERISA.<sup>171</sup> Finally, the court considered the effect of the spendthrift provision in the plan itself on the Tax Board's ability to levy upon benefits due beneficiaries under the plan. The plan argued that the case was distinguishable from *Mackey* on the ground that in *Mackey* there was no spendthrift provision in the plan itself.<sup>172</sup> The court rejected this argument noting that the Supreme Court in *Mackey* "held that ERISA does not preclude state-law attachment of ERISA welfare plan benefits, without qualification."<sup>173</sup> Thus, the spendthrift provision in the plan was held not to prohibit the Tax Board from levying upon benefits due beneficiaries under the plan. The court stated: "To hold that anti-alienation provisions in a welfare benefit plan immunizes the plan from attachment and garnishment of welfare benefits would be in effect to find preemption."<sup>174</sup>

In the same way that "ERISA does not preclude state-law attachment of ERISA welfare plan benefits, without qualification,"<sup>175</sup> ERISA does not preclude the assignment of such benefits, without qualification.<sup>176</sup> Thus, under the reasoning of *Franchise Tax Board*, an anti-assignment ("spendthrift") provision in an ERISA-governed employee health care plan should be held by the courts to be unenforceable against a health care provider as a matter of law.

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169. *Franchise Tax Board*, 204 Cal. App. 3d at 964, 251 Cal. Rptr. at 602.

170. 486 U.S. 825 (1988). For a thorough discussion of *Mackey*, see *infra* notes 199-228 and accompanying text.

171. *Franchise Tax Board*, 204 Cal. App. 3d at 965-66, 251 Cal. Rptr. at 602-03.

172. *Id.* at 966, 251 Cal. Rptr. at 603.

173. *Id.* at 967, 251 Cal. Rptr. at 604.

174. *Id.*

175. *Id.*

176. See *supra* note 108 (quotation from the Supreme Court's opinion in *Mackey*), *supra* notes 102-05 and accompanying text, and *supra* text accompanying note 140.



### 3. Summary

Virtually every court that has considered the issue has concluded that a health care provider that has been assigned the benefits due a participant or beneficiary in an ERISA-governed employee health care plan in exchange for services rendered has standing, derivatively, to sue the plan under section 1132(a)(1) (B) to recover the benefits.<sup>177</sup> The Fifth Circuit in *Hermann Hospital* held that the assignment to the health care provider must be "valid," and remanded for a determination of whether the assignment in question was valid in light of, among other things, the plan's assertion that assignments were prohibited under the terms of its plan. It is submitted that if the spendthrift provision in the plan in question in *Hermann Hospital* could be construed as invalidating the assignment to Hermann Hospital as a matter of contract law, the provision should be held by the district court on remand to be unenforceable as a matter of law against Hermann Hospital based on the principle of trust law which holds that a spendthrift provision is unenforceable against a provider of necessities. To hold otherwise would be contrary to public policy and to the provisions and policies of ERISA. Moreover, it would be to place in the hands of the trustees of an ERISA health care plan the power to decide whether health care providers will have derivative standing to sue the plan. To render the plan immune from suit by a health care provider under a derivative standing theory, the trustees would simply need to insert in the plan a spendthrift provision taking away both the right and the power of plan participants and beneficiaries to assign their benefits to health care providers, and providing that any such assignment shall be void. This would defeat the health care provider's derivative standing by rendering the assignment invalid, and would constitute an end-run around *Misic* and *Hermann Hospital*. Such a result would be untenable.

#### C. *Standing To Sue Under The Theory That The List of Persons Expressly Empowered By Section 1132(a) of ERISA to Sue Is Not Exclusive*

Section 1132(a) of ERISA expressly empowers participants, beneficiaries, fiduciaries and the Secretary of Labor to bring civil actions under ERISA.<sup>178</sup> Whether other persons may bring civil ac-

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177. See cases cited at *supra* note 39.

178. See *supra* notes 26-29 and accompanying text for a discussion of section 1132(a).

tions under ERISA "has been the subject of much debate"<sup>179</sup> among the United States Courts of Appeals. The debate has focused primarily on the issue of whether employers,<sup>180</sup> employee benefit plans,<sup>181</sup> and unions<sup>182</sup> have standing to sue under ERISA.

179. *Hermann Hosp. v. MEBA Medical & Benefits Plan*, 845 F.2d 1286, 1287 (5th Cir. 1988) (footnote omitted); *see also* Note, *ERISA: To Sue or Not to Sue*, *supra* note 33, at 240-41 ("There is a fundamental split among the United States Courts of Appeals concerning whether parties not specifically enumerated in section 502(a) [29 U.S.C. § 1132(a)] have standing to bring civil actions to enforce ERISA's provisions").

180. *Compare Fentron Indus., Inc. v. National Shopmen Pension Fund*, 674 F.2d 1300, 1304-05 (9th Cir. 1982) (employer has standing to sue under ERISA) with *Giardono v. Jones*, 867 F.2d 409, 412-13 (7th Cir. 1989) (employer does not have standing to sue under ERISA). *See generally* Note, *ERISA: To Sue or Not To Sue*, *supra* note 33 (addressing issue of whether employers have standing to sue under ERISA). *Cf.* *Carl Colteryahn Dairy, Inc. v. Western Pa. Teamsters and Employers Pension Fund*, 847 F.2d 113, 122 (3d Cir. 1988) ("[W]e hold that, under the federal common law of pension plans, Colteryahn, as a defrauded employer, may sue in federal court for the return of any withdrawal liability sums that were assessed as a result of a fraudulent inducement to join the Fund" (emphasis added)); *Kahler Corp. v. John Hancock Mut. Life Ins. Co.*, No. 4-88-1109 (D. Minn. Oct. 2, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 119176) (employer likely does not have standing to sue under ERISA in its capacity as an employer but does have standing to sue under ERISA in its capacity as an ERISA fiduciary and under the federal common law).

The specific issue of whether an employer may sue under ERISA to recover overpayments to an ERISA plan has been the subject of much recent case law and commentary. *See, e.g.*, *Airco Indus. Gases, Inc. v. Teamsters Health and Welfare Pension Fund*, 850 F.2d 1028, 1034 n.6 (3d Cir. 1988) (citing cases that address the "hotly debated" question of "whether an action by employer-contributors to recover overpayments can be implied from ERISA, or created under the theory of unjust enrichment"); *see also* *South Cent. United Food & Commercial Workers Unions v. C & G Markets, Inc.*, 836 F.2d 221, 224-25 (5th Cir.) ("ERISA does not provide a private right of action to an employer seeking to recover mistakenly overpaid contributions," *id.* at 224, however, "we hold that there is a right to offset mistakenly overpaid contributions against a delinquency owed" where "the original action was brought by the plan trustee against the employer." *Id.* at 225), *cert. denied*, 486 U.S. 1056 (1988). *See generally* Stone, *A Path of No Return: Employer Overpayments Into Employee Benefit Plans*, 8 INDUS. REL. L.J. 68 (1986); Note, *An Employer's Implied Cause of Action For Restitution Under Section 403 of ERISA*, 54 FORDHAM L. REV. 225 (1985); Note, *Implying a Statutory Right for Employers for the Return of Mistaken Overcontributions to a Multiemployer Employee Benefit Plan*, 62 NOTRE DAME L. REV. 396 (1987).

181. *See generally* Note, *ERISA: To Sue or Not to Sue*, *supra* note 33 (addressing issue of whether employee benefit plans have standing to sue under ERISA); Annotation, *Right of Pension Plan, As Entity, To Bring Civil Enforcement Action Under § 502 of Employee Retirement Income Security Act of 1974 (29 USCS § 1132)*, 67 A.L.R. FED. 947 (1984). *Cf.* *Kentucky Laborers Dist. Council Health and Welfare Fund v. Hope*, 861 F.2d 1003, 1004-06 (6th Cir. 1988) (ERISA-governed employee health and welfare plan had federal common law cause of action "to recover benefits allegedly paid in violation of the plan[,]"; *id.* at 1004, because the plan's state law claims were preempted by ERISA); *Kahler Corp. v. John Hancock Mut. Life Ins. Co.*, No. 4-88-1109 (D. Minn. Oct. 2, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 119176) (ERISA plans may not sue under ERISA on their own behalf but may very well have a federal common law claim).

182. *See* *American Fed'n of Unions Local 102 Health & Welfare Fund v. Equitable Life Assur. Soc'y of the United States*, 841 F.2d 658, 665 (5th Cir. 1988) ("there is a conflict between the Circuits on the issue of union standing"). *Compare* *International Ass'n of Bridge*,

In *Fentron Industries, Inc. v. National Shopmen Pension Fund*,<sup>183</sup> an employer filed an action against an ERISA-governed employee pension plan and its trustees for injunctive and declaratory relief, alleging that the actions of the trustees in cancelling past service pension credits of the employer's employees violated ERISA.<sup>184</sup> In determining whether the employer had standing to sue under ERISA, the Ninth Circuit applied a three-part test for implied statutory standing.<sup>185</sup> The court stated: "In order to have standing to sue for violations of a federal statute, a plaintiff must: (1) suffer an injury in fact; (2) fall arguably within the zone of interests protected by the statute allegedly violated; and (3) show that the statute itself does not preclude the suit."<sup>186</sup>

Applying the above-quoted three-part test for implied statutory standing, the *Fentron* court concluded, first, that the employer's injuries were specific and personal because "[t]he failure of the Fund to pay pension benefits will impair [the employer's] relationship with the Union."<sup>187</sup> Second, the court concluded that the employer's "alleged injuries . . . fall within the zone of interests that Congress intended to protect when it enacted ERISA."<sup>188</sup> Specifically, the court concluded that Congress, in enacting ERISA, was concerned with fostering "the stability of employment and the successful development of industrial relations,"<sup>189</sup> and that "[t]he threat to [the employer's] relationship with the Union, and to the continued employment by [the employer] of its employees, falls within this range of concerns."<sup>190</sup> Third, and finally, the court noted that it did not believe "that Congress, in enacting ERISA, intended to prohibit employers from suing to enforce its provisions."<sup>191</sup> The court stated: "There is nothing in the legislative history to suggest either that the

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Structural and Ornamental Iron Workers Local No. 111 v. Douglas, 646 F.2d 1211, 1214 (7th Cir.) (union has standing to sue under ERISA), *cert. denied*, 454 U.S. 866 (1981) with District 65, UAW v. Harper & Row, Publishers, Inc., 576 F. Supp. 1468, 1476 (S.D.N.Y. 1983) (union lacks standing to sue under ERISA).

183. 674 F.2d 1300 (9th Cir. 1982).

184. *Id.* at 1303.

185. See *Misic v. Building Serv. Employees Health and Welfare Trust*, 789 F.2d 1374, 1378 (9th Cir. 1986) (referring to "the three-part test for implied statutory standing outlined in *Fentron*").

186. *Fentron*, 674 F.2d at 1304.

187. *Id.*

188. *Id.* at 1305.

189. *Id.* (quoting 29 U.S.C. § 1001(a) (1982)); see also *id.* (in enacting ERISA "Congress [intended] to protect employer-employee relations").

190. *Id.*

191. *Id.*

list of parties empowered to sue under [section 1132(a)] is exclusive or that Congress intentionally omitted employers."<sup>192</sup> Thus, the court held that the plaintiff-employer had standing to sue under ERISA.

Whether a health care provider has standing to sue under ERISA under a *Fentron*-type of analysis has been addressed by only one court—the Fifth Circuit in *Hermann Hospital v. MEBA Medical & Benefits Plan*.<sup>193</sup> The Fifth Circuit, relying on the Second Circuit's decision in *Pressroom Unions Printers League Income Security Fund v. Continental Assurance Co.*,<sup>194</sup> rejected the Ninth Circuit's reasoning in *Fentron*. The Fifth Circuit quoted from the *Pressroom* opinion in holding "that 'only Congress is empowered to grant and extend subject matter jurisdiction of the federal judiciary, and . . . courts are not to infer a grant a jurisdiction absent clear legislative mandate.'"<sup>195</sup> Thus, the Fifth Circuit held that a health care provider does not have standing to sue under ERISA under a *Fentron*-type of analysis.

One statement made by the Fifth Circuit in the context of its discussion of whether a health care provider has standing to sue under ERISA under a *Fentron*-type of analysis deserves comment. The court stated:

One case has held that a health care provider possesses no ERISA standing in its own right. *Cameron Manor, Inc. v. United Mine Workers of America* . . . . The *Cameron* court cited the Supreme Court's opinion in *Franchise Tax Board of California v. Construction Laborer's Vacation* . . . for the proposition that federal jurisdiction under § 1132(a)(1)(B) "is limited to suits by the entities specified in the statute." . . . *Although we adopt the literal construction of § 1132(a) and agree that a health-care provider may not sue as a non-enumerated party, we disagree with the court's analysis of Franchise Tax Board.* The Supreme Court did not squarely address the scope of § 1132(a) and focused instead on general federal question jurisdiction. The Court certainly did not address the status of an assignee of health care benefits, an issue we address in part II hereof.<sup>196</sup>

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192. *Id.*

193. 845 F.2d 1286 (5th Cir. 1988). The facts of this case are discussed in detail at *supra* note 94.

194. 700 F.2d 889 (2d Cir.), *cert. denied*, 464 U.S. 845 (1983).

195. *Hermann Hosp.*, 845 F.2d at 1288 (quoting *Pressroom*, 700 F.2d at 892).

196. *Id.* at 1288 n.9 (emphasis added).

This statement should not be construed as adopting the Cameron court's erroneous conclusion that a health care provider can never qualify as a beneficiary as defined in section 1002(8) of ERISA as a matter of law.<sup>197</sup> The Fifth Circuit's statement clearly indicates that it was adopting *only* the Cameron court's view that only participants, beneficiaries, fiduciaries, and the Secretary of Labor may bring civil actions under ERISA. The Fifth Circuit was not holding that a health care provider can never qualify as a beneficiary as defined in section 1002(8) of ERISA. As has previously been discussed,<sup>198</sup> the Fifth Circuit was of the opinion that Hermann Hospital was not claiming to be a beneficiary, and therefore did not address the issue of whether a health care provider can qualify as a beneficiary as defined in ERISA.

### III. GARNISHMENT OF EMPLOYEE WELFARE BENEFITS

In seeking to recover benefits due under an ERISA-governed employee health care plan for services rendered to an individual covered by the plan, a health care provider is not always limited to bringing a civil action against the plan under section 1132(a)(1)(B) of ERISA. The United States Supreme Court recently made clear in *Mackey v. Lanier Collections Agency & Service, Inc.*<sup>199</sup> that a second option available to a health care provider is to obtain a money judgment against the patient for the value of the services rendered and then invoke state garnishment law to garnish the benefits due the patient under the plan to satisfy the judgment.<sup>200</sup>

In *Mackey* money judgments were obtained by a collection agency against twenty-three participants in an ERISA-governed employee welfare benefit plan.<sup>201</sup> To satisfy the judgments, the collection agency sought to garnish benefits due the participants under the plan.<sup>202</sup> The collection agency invoked Georgia's general garnishment statute.<sup>203</sup> The plan responded by asserting that the benefits due the participants under the plan were exempt from garnishment

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197. For a thorough discussion of *Cameron*, see *supra* notes 46-76 and accompanying text (Section II.A.1. *Cameron Manor, Inc. v. United Mine Workers of America*).

198. See *supra* note 94.

199. 486 U.S. 825 (1988). For student commentary on the *Mackey* decision see Recent Case, 27 DUQ. L. REV. 783 (1989).

200. Of course, this assumes that state garnishment law permits garnishment of an employee's fringe benefits. If state garnishment law does not permit this, then garnishment under state law is not an option.

201. *Mackey*, 486 U.S. at 827.

202. *Id.* at 827-28.

203. GA. CODE ANN. §§ 18-4-20 to 18-4-135 (1989).

pursuant to section 18-4-22.1 of the Georgia Code, which provides in pertinent part that:

Funds or benefits of a pension, retirement, or *employee benefit plan* or program subject to the provisions of the Federal Employee Retirement Income Security Act of 1974, as amended, shall not be subject to the process of garnishment . . . unless such garnishment is based upon a judgment for alimony or for child support . . . .<sup>204</sup>

The plan argued that since the judgments were not for alimony or child support, the benefits were exempt from garnishment pursuant to section 18-4-22.1. The collection agency responded that section 18-4-22.1 was preempted by ERISA, section 1144(a),<sup>205</sup> and therefore did not operate to exempt the benefits from garnishment. The plan replied that if section 18-4-22.1 was preempted by ERISA, then so was Georgia's general garnishment statute and, therefore, benefits due under the plan were not subject to garnishment.

In deciding the case the Supreme Court engaged in a two-part inquiry: (1) does ERISA's preemption provision, section 1144(a), preempt section 18-4-22.1 of the Georgia Code, and (2) if so, does ERISA's preemption provision also preempt Georgia's general garnishment statute? With respect to the first inquiry, the Court noted that section 1144(a) of ERISA preempts all state laws insofar as they "relate to" an employee benefit plan.<sup>206</sup> Adhering to its precedents on the issue of when a state law "relates to" an employee benefit plan,<sup>207</sup> the Court with little difficulty concluded that section 18-4-22.1 of the Georgia Code was preempted by section 1144(a) of ERISA. The Court emphasized the fact that section 18-4-22.1 "singles out ERISA employee welfare benefit plans for different treatment under state garnishment procedures"<sup>208</sup> and observed that "we have virtually taken it for granted that state laws which are 'specifically designed to affect employee benefit plans' are preempted under § 514(a) [29 U.S.C. § 1144(a)]."<sup>209</sup> Moreover, the fact that the Georgia legislature enacted section 18-4-22.1 to help effectuate what it perceived to be ERISA's underlying purposes was not, in the

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204. *Id.* § 18-4-22.1 (emphasis added).

205. 29 U.S.C. § 1144(a) (1982). See *supra* note 10 for the text and a discussion of section 1144(a).

206. *Mackey*, 486 U.S. at 829.

207. See *supra* note 10.

208. *Mackey*, 486 U.S. at 830 (footnote omitted).

209. *Id.* at 829.

Court's view, "enough to save the state law from pre-emption."<sup>210</sup>

After concluding that section 1144(a) of ERISA preempts section 18-4-22.1 of the Georgia Code, the Court turned to the "more complex question"<sup>211</sup> of whether section 1144(a) also preempts Georgia's general garnishment statute. The Court first observed that "[u]nlike the Georgia antigarnishment provision [§ 18-4-22.1] . . . Georgia's general garnishment statute does not single out or specially mention ERISA plans of any kind."<sup>212</sup> This fact, however, was not decisive because, as the Court stated, "the preemptive force of § 514(a) [29 U.S.C. § 1144(a)] is not limited to . . . state laws"<sup>213</sup> that single out or specially mention ERISA plans. Thus, the Court turned to an analysis of whether Georgia's general garnishment statute "relates to" ERISA-governed employee welfare benefit plans within the meaning of section 1144(a).<sup>214</sup> The plan argued that Georgia's general garnishment statute "relates to" such plans because under that statute "plan trustees are served with a garnishment summons, become parties to a suit, and must respond and deposit the demanded funds due the beneficiary-debtor,"<sup>215</sup> and because "benefit plans subjected to garnishment will incur substantial administrative burdens and costs."<sup>216</sup> The Court rejected this argument stating:

In our view . . . certain ERISA provisions, and several aspects of the statute's structure, indicate that Congress did not intend to forbid the use of state-law mechanisms of executing judgments against ERISA welfare benefit plans, even when those mechanisms prevent plan participants from receiving their benefits. Consequently, we join the virtually unanimous view of federal and state courts which have faced this question, and hold that federal law does not bar a garnishment action like respondent's.<sup>217</sup>

The Court reasoned that section 1132(d)(1)<sup>218</sup> of ERISA provides that an employee benefit plan may "sue or be sued" as an

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210. *Id.*

211. *Id.* at 830.

212. *Id.* at 831.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 831-32 (footnote omitted).

218. 29 U.S.C. § 1132(d)(1) (1982). For the text of section 1132(d)(1), see *supra* note

entity and that section 1132(d)(2)<sup>219</sup> “contemplates execution of judgments won against plans in civil actions”<sup>220</sup> but that “ERISA does not provide an enforcement mechanism for collecting judgments”<sup>221</sup> won against ERISA plans.

Consequently, state-law methods for collecting money judgments must, as a general matter, remain undisturbed by ERISA; otherwise, there would be no way to enforce such a judgment won against an ERISA plan. If attachment of ERISA plan funds does not “relate to” an ERISA plan in any of these circumstances, we do not see how respondent’s proposed garnishment order would do so.

It is thus clear enough that money judgments against ERISA welfare benefit plans, based on state or federal law, won in state or federal court, must be collectable in some way; garnishment is one permissible method.<sup>222</sup>

The Court also reasoned that ERISA’s anti-assignment/anti-alienation provision, section 1056(d)(1),<sup>223</sup> which prohibits garnishment of *pension* plan benefits, does *not* prohibit garnishment of welfare plan benefits.<sup>224</sup> “Once Congress was sufficiently aware of the prospect that ERISA plan benefits could be attached and or garnished—as evidenced by its adoption of § 206(d)(1) [29 U.S.C. § 1056(d)(1)]—Congress’ decision to remain silent concerning the attachment or garnishment of ERISA welfare plan benefits ‘acknowledged and accepted the practice, rather than prohibiting it.’”<sup>225</sup> Thus, the Court held that Georgia’s general garnishment statute was not preempted by section 1144(a) and that, therefore, benefits due under the welfare plan in question were subject to garnishment.<sup>226</sup>

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219. 29 U.S.C. § 1132(d)(2) (1982).

220. *Mackey*, 486 U.S. at 833.

221. *Id.*

222. *Id.* at 834 (footnote omitted).

223. 29 U.S.C. § 1056(d)(1) (1982).

224. *Mackey*, 486 U.S. at 836-38; *see supra* note 108 (quotation from the Supreme Court’s opinion in *Mackey*).

225. *Id.* at 837 (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 516 (1981)).

226. It is important to note that the *Mackey* decision deals only with the effect of ERISA’s preemption provision on state garnishment laws insofar as those laws concern ERISA *welfare* benefit plans. The *Mackey* decision does not address the effect of ERISA’s preemption provision on state garnishment laws insofar as those laws concern ERISA *pension* benefit plans. Other courts, however, have held that ERISA pension benefits are not subject to garnishment under state garnishment law. *See, e.g.*, *Tenneco, Inc. v. First Va. Bank of Tidewater*, 698 F.2d 688, 690 (4th Cir. 1983) (debtor’s pension plan benefits “are beyond the reach of a writ of garnishment”); *General Motors Corp. v. Buha*, 623 F.2d 455, 463 (6th Cir.



In *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*,<sup>227</sup> a case decided soon after *Mackey*, the California Court of Appeals held that under *Mackey* welfare benefits are subject to garnishment even if the plan instrument itself contains a spendthrift (or anti-garnishment) provision.<sup>228</sup>

#### IV. CONCLUSION

It is clear that Congress, through oversight, failed to consider the effect of ERISA on health care providers that render services to participants and beneficiaries in ERISA-governed employee health care plans. ERISA has been construed as preempting health care providers' state law claims against ERISA-governed employee health care plans.<sup>229</sup> At the same time, ERISA's civil enforcement provisions do not expressly create a cause of action in favor of health care providers. To leave health care providers without a remedy, and thereby force them to refuse to treat participants and beneficiaries in ERISA-governed employee health care plans, is so inconsistent with the purposes and policies of ERISA that it must be assumed that Congress did not intend such a result. The Ninth, Fifth and Seventh Circuits have recognized this and have held that in cases involving an assignment of benefits a health care provider has derivative standing to assert the claims of its assignor under ERISA's civil enforcement provisions. In the district courts in the Third Circuit, however, health care providers, with one exception,<sup>230</sup> have been denied derivative standing<sup>231</sup> and are therefore without a remedy.<sup>232</sup> Also appar-

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1980) ("[W]e conclude that pension plan benefits are not subject to garnishment"); *Commercial Mortgage Ins., Inc. v. Citizen's Nat'l Bank of Dallas*, 526 F. Supp. 510, 521-22 (N.D. Tex. 1981) ("The Court has concluded that ERISA does not create a federal exemption for pension benefits and thus even under a narrow reading of ERISA's preemption provision, state law governing commercial garnishment of pension benefits would necessarily be preempted").

As discussed at *supra* note 149, however, courts have recognized numerous implied exceptions to the general rule that ERISA pension benefits are not subject to garnishment.

227. 204 Cal. App. 3d 955, 251 Cal. Rptr. 597 (1988).

228. *Id.* at 966-67, 251 Cal. Rptr. at 603-04. See *supra* notes 162-74 and accompanying text for a thorough discussion of the *Franchise Tax Board* case.

229. See cases cited at *supra* note 24.

230. *Albert Einstein Medical Center v. National Benefit Fund for Hosp. and Health Care Employees*, No. 89-5931 (E.D. Pa. Dec. 20, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 156374).

231. *Health Scan, Ltd. v. Travelers Ins. Co.*, 725 F. Supp. 268, 269 (E.D. Pa. 1989); *Nationwide Mut. Ins. Co. v. Teamsters Health and Welfare Fund*, 695 F. Supp. 181, 184 (E.D. Pa. 1988).

232. Of course, a health care provider can try to establish that it has standing to sue in its own right under the theory that it qualifies as a beneficiary as defined in section 1002(8) of

ently without a remedy in any circuit is a health care provider that does not have an assignment or that has an invalid assignment. In light of this situation, Congress should amend section 1132(a) of ERISA to include health care providers among the list of persons expressly empowered to sue under that section.

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ERISA. See *supra* notes 41-94 and accompanying text. (Section II.A. *Persons Expressly Empowered by Section 1132(a) of ERISA to Sue*). Also, there is always the "remedy" of garnishment under state law in states that allow garnishment of an employee's fringe benefits. See *supra* notes 199-228 and accompanying text (Section III. GARNISHMENT OF EMPLOYEE WELFARE BENEFITS). Finally, at least two district courts in the third circuit have held that certain state law claims of health care providers are not preempted by ERISA. *Albert Einstein Medical Center v. National Benefit Fund for Hosp. and Health Care Employees*, No. 89-5931 (E.D. Pa. Dec. 20, 1989) (WESTLAW, ALLFEDS Database, 1989 WL 156374) (provider's state law claims for breach of contract, unjust enrichment, quantum meruit and promissory estoppel not preempted "to the extent that plaintiffs are claiming an independent right to payment, apart from the terms of the plan"); *Albert Einstein Medical Center v. Action Mfg. Co.*, 697 F. Supp. 883, 884 (E.D. Pa. 1988) (provider's state law estoppel claim not preempted).

